91-286

FILED
AUG 6 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAMELA MUHAMMAD, et. al.,
Petitioners,

v.

STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK,
a law partnership, et. al.,
Respondents.

APPENDIX

KENNETH W. BEHREND
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515
Counsel of Record

August 6, 1991

APPENDIX

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SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,

v.

STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; HOWARD MESSER and JAMES THOMAS, JR.

APPEAL OF STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; and HOWARD MESSER

No. 5, W.D. APPEAL DOCKET 1989

Appeal from the Order of Superior Court at No. 218 Pittsburgh, 1987, entered May 13, 1988, reversing the Order of the Court of Common Pleas, Civil Division, Allegheny County, entered January 13, 1987 at No. GD 84-6520 and remanding the case.

374 Pa. Super 613, 543 A.2d 1138 (1988)

ARGUED: March 5, 1990

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the **SUPERIOR COURT OF PENNSYLVANIA** be, and the same is, hereby reversed and the within complaint is dismissed.

/s/ IRMA T. GARDNER
Deputy Prothonotary

DATED: March 15, 1991

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,

Appellees

vs

STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; HOWARD MESSER and JAMES THOMAS, JR.,

APPEAL OF STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; and HOWARD MESSER

No. 5, W.D. APPEAL Dkt 1989

Appeal from the Order of Superior Court at No. 218 Pittsburgh, 1987, entered May 13, 1988, reversing the Order of the Court of Common Pleas, Civil Division, Allegheny County, entered January 13, 1987 at No. GD 84-6520 and remanding the case.

374 Pa. Super 613, 543 A.2d 1138 (1988)

ARGUED: March 5, 1990

OPINION OF THE COURT

MR. JUSTICE CAPPY* FILED: MARCH 15, 1991

We granted allocatur to determine whether the appellees' claim of legal malpractice stemming from their dissatisfaction with the settlement of their prior medical malpractice action is barred by

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* This opinion was reassigned to this writer.

the doctrine of collateral estoppel and whether, as a matter of law, the appellees have alleged sufficient facts to entitle them to proceed with their action. For the reasons set forth herein, we hold that the case sub judice is not barred by the doctrine of collateral estoppel, but that the appellees have failed to allege sufficient facts, which if proved, would entitle them to relief.

FACTUAL AND PROCEDURAL HISTORY

The facts of this case and its procedural history are so entwined that we must address them together.

On November 7, 1977, Pamela Muhammad and Abdullah Muhammad, husband and wife, had a son, Nazir, born to them at Magee-Womens Hospital in Pittsburgh, Pennsylvania. Upon the parents' request, a circumcision was performed on baby Nazir, but the procedure apparently failed to remove the entire foreskin.

Subsequent to the initial circumcision, a second procedure was scheduled at Childrens' Hospital in Pittsburgh on December 16, 1977. During the surgery, the infant suffered pulmonary edema as a consequence of the general anesthesia and died three days later.

Appellees initially retained the services of the appellant, attorney James Thomas, Jr., to represent them in the claim arising from the death of their son. At the suggestion of Mr. Thomas, the appellees subsequently retained the services of the appellant law firm of Strassburger, McKenna, Messer, Shilobod and Gutnick. Mr. Messer assumed control of the case and filed a complaint against Children's Hospital, Dr. Stuart E. Price, Jr., (the urologist who performed the second circumcision) and Dr. Helen Westman (the attending anesthesiologist).

After the depositions of the above named physicians, settlement negotiations began and the defendants offered a settlement figure of $23,000 to the Muhammads. The Muhammads communicated

their acceptance of the offer to their attorneys. At a pre-trial conference, the defendants increased the offer to $26,500 at the suggestion of the court. That settlement offer was accepted by the appellees.

At some point thereafter, the appellees informed their attorneys of their dissatisfaction with the amount of the amount of the settlement. The appellants communicated their clients' dissatisfaction to the opposing side, prompting the attorneys for the defendants to petition the trial court for a Rule to Show Cause why the settlement agreement should not be enforced.

After an evidentiary hearing, the court determined that the appellees had agreed to the $26,500 settlement and had communicated such agreement to the appellants. Based on those facts, the trial court upheld the settlement agreement, ordered the defendants to pay the settlement sum, and instructed the prothonotary to mark the docket settled and discontinued when the funds were received.

Appellees obtained new counsel and appealed to the Superior Court, which affirmed the settlement

order. Muhammad v. Childrens' Hospital of Pittsburgh, 337 Pa. Super. 635, 487 A.2d 443 (1984) (unpublished memorandum opinion).

The Muhammads then filed the instant legal malpractice suit against the attorneys who had represented them in the medical malpractice case.[1] In response to appellee's second amended complaint, the appellants' filed preliminary objections in the nature of a demurrer, alleging inter alia, that the current action should be dismissed because it sought to relitigate the settlement and because the Muhammads' claim of loss was too speculative and thus failed to state a cause of action. The trial court granted the preliminary objections on the basis that the action was barred by the Superior Court's decision in the medical malpractice case (collateral estoppel).

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[1] The Muhammads' second amended complaint contains the following counts: Fraudulent Misrepresentation (deceit); Fraudulent Concealment (deceit); Nondisclosure; Breach of Contract; Negligence; Outrageous Conduct Causing Severe Emotional Distress and Breach of Fiduciary Duty.

On appeal, the Superior Court reversed the decision of the trial court, holding that the order sustaining the preliminary objections could not be affirmed upon the doctrine of collateral estoppel.

DISCUSSION

At the outset, we agree with the Superior Court that the appellees instant action is not barred by the doctrine of collateral estoppel. In order to grant a demurrer pursuant to that doctrine, the objecting party must show that "the fact or facts at issue in both instances were identical; [and] that these facts were essential to the first judgment and were actually litigated in the first cause." Schubach v. Silver, 461 Pa. 366, 377, 336 A.2d 328, 334 (1975). We have also required that the party against whom a plea of collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in question in a prior action. In re Ellis' Estate, 460 Pa. 281, 287, 333 A.2d 728, 731 (1975). The issue in the first case was whether Mrs. Muhammad had

authorized the settlement. The issues in the case before us are whether the attorney appellants were negligent and/or deceitful in their representation of the Muhammads and, if so, whether the Muhammads suffered harm as a result. It is thus evident that the matter is not barred by the doctrine of collateral estoppel as there are issues in this case that were not litigated in the medical malpractice case.

Although we find that collateral estoppel does not bar this action, we do not believe that our inquiry need or should cease there. Rather, preliminary objections should have been granted due the appellees' failure to state a claim for which relief can be granted.

This case must be resolved in light of our long-standing public policy which encourages settlements. Simply stated, we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action.

An action should not lie against an attorney for malpractice based on negligence and/or contract principles when that client has agreed to a settlement. Rather, only cases of fraud should be actionable.

In order to reach this conclusion, we review the facts of this case as they have evolved in the courts of the Commonwealth. In deciding this case, we are mindful of our standard of review for preliminary objections. As we said in the case of Vattimo v. Lower Bucks Hosp., Inc., 502 Pa. 241, 465 A.2d 1231, 1232-33 (1983):

> All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for [the purpose of this review.] Clevenstein v. Rizzuto, 439 Pa. 397, 266 A.2d 623 (1970). The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970). Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved

in favor of overruling it. Birl v. Philadelphia Electric Co., 402 Pa. 297, 167 A.2d 472 (1960).

Our review of this case begins with the settlement that occurred in the medical malpractice action. The essence of a settlement is contractual in nature. There is an offer (the settlement figure), acceptance, and consideration (in exchange for the plaintiff terminating his lawsuit, the defendant will pay the plaintiff the agreed upon sum). Thus, the trial court's enforcement of that settlement was merely upholding the terms of a binding contract.

In the medical malpractice case which preceded the case sub judice, a binding contact was formed; Mrs. Muhammad agreed to the offered settlement of the defendant-physicians and communicated such agreement to her attorney. The plaintiffs agreed to dismiss the suit in exchange for the defendants paying the sum of $26,500. It was only after that contract was formed that she decided--for reasons unknown at that time--that it just was not enough money. Her change of mind, however, did not

entitle her to have the settlement agreement set aside. As this court has stated;

> The law demands of every man who bargains with another that he should do so only after due reflection of the possible consequences of his bargain and if he misjudges the consequences that could have been expected by a reasonably intelligent man, he cannot rely on the law to remedy his fecklessness. New Charter Coal Co. v. McKee, 411 Pa. 307, 312, 191 A.2d 830, 833 (1963).

This situation has been referred to as the "too bad category" of contracts; although a party to a contract believes he might have made a better deal after he agreed to the original contract, he is nonetheless bound by the terms of that primary agreement. The courts of this Commonwealth, relying on established principles of contract law, upheld the Muhammads' settlement agreement.

Nevertheless, due to their dissatisfaction with the settlement, the Muhammads subsequently filed the instant action against the attorneys who represented them throughout the medical malpractice case;

alleging negligence, breach of contract, fraudulent concealment and nondisclosure.

Based on our strong and historical public policy of encouraging settlements, we do not believe that the Muhammads should be permitted to continue with this lawsuit.

The primary reason we decide today to disallow negligence or breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients is that to allow them will create chaos in our civil litigation system. Lawyers would be reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that "could have been done, but was not." We refuse to endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases. A long-standing principle of our courts has been to encourage settlements; we will not now act so as to discourage them.

In fact, this court promulgated Pa.R.C.P. 238 for the express purpose of encouraging pre-trial settlement. "Thus, the format of Rule 238 is responsive to its fundamental goal of prompting meaningful negotiations in major cases so as to unclutter the courts." Laudenberger v. Port Auth. of Allegheny Cty., 496 Pa. 52, 60, 436 A.2d 147, 151 (1981), appeal dismissed, sub nom, Bucheit v. Laudenberger, 456 U.S. 940 (1982). Although Rule 238 was declared unconstitutional in Craig v. Magee Mem. Rehab. Ctr., 512 Pa. 60, 515 A.2d 1350 (1986), the importance of settlements was never challenged. Moreover, the new Rule 238 now stands as direct evidence of our commitment to meaningful negotiations for settlement.[2]

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2 The current Rule 238 of the Pennsylvania Rules of Civil Procedure provides, in pertinent part, that:

> (a)(1) At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff. . . .

The explanatory comment following the Rule states that the "Court in Craig did not 'overrule the

In 1982, the then Chief Justice of the United States Supreme Court, Warren Burger, addressed the American Bar Association and focused on the growing wave of litigation that threatened to overwhelm our legal system.[3] The Chief Justice centered his concern on the "delay and lack of finality"[4] in litigation and remarked that "[i]t appears that people tend to be less satisfied with one round of litigation and are demanding a 'second bite of the apple' far more than in earlier times."[5] Particularly troublesome to the efficacy of the courts are these "second bite" cases; they require twice the resources as a single case, yet resolve only a single litigant's claims--thus denying access to the

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rationales of Laudenberger. . . for they have validity of their own in the context of the ends sought,' [cite omitted]. . . Laudenberger set forth two purposes for Rule 238: (1) to alleviate delay in the courts, and (2) to encourage defendants to settle meritorious claims as soon as reasonably possible."

[3] Burger, Isn't There a Better Way?, 68 A.B.A.J. 274 (1982).

[4] Id. at 274.

[5] Id. at 275.

courts to litigants who have never had a single resolution of their dispute. For that reason, henceforth we should view "litigation concerning litigation" cases with a jaundiced eye.

Numerous commentators have addressed the problem of overcrowded courts and the importance of settlements to the efficient flow of justice.[6] A fundament of those articles is that settlement of civil litigation is critical to the courts' management of caseloads. Without settlement of cases, litigants would have to wait years, if not decades, for their day in court. Nearly 90% of all matters in controversy end in settlement.[7] Were we, as a court, to encourage litigation that would undermine the current rate of settlements, we would do a grave injus-

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[6] See, e.g., Title, The Lawyer's Role in Settlement Conferences, 67 A.B.A.J. 592 (1981); Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485 (1985); McThenia & Shaffer, For Reconciliation, 94 Yale L.J. 1660 (1985).

[7] Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and This We Know) About Our Allegedly Contentious Society, 31 UCLA L.Rev. 4 (1983).

tice and disservice to the citizens of the Commonwealth. "The settlement of cases before trial is one of the greatest potentials for assisting the courts to reduce their caseloads."[8] As courts are fond of repeating, "[j]ustice delayed is justice denied." See e.g. Stottlemyer v. Stottlemyer, 458 Pa. 503, 522, 329 A.2d 892, 901 (1974), Roberts, J., dissenting.

The Pennsylvania Constitution also expressly recognizes that access to the courts without delay is a right to be enjoyed by all citizens. "All courts shall be open; and every man for an injury done him. . . shall have remedy by due course of law, and right and justice administered without . . . delay." Article I, Section 11 (emphasis supplied).[9]

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[8] Title, supra, at 592.

[9] We do not mean to suggest that all wrongs can be remedied by means of the court system. Many wrongs do not have a correlative legal remedy and many wrongs must be pursued by avenues other than the court system. For example, workers injured on the job may not sue their employers; the sole redress is through the worker's compensation arbitration system.

In addition to promoting settlements for purposes of judicial economy, there are other, more significant reasons that we encourage them. Professor Menkel-Meadow provides a compelling and eloquent statement of the purposes of settlements in her article, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference;

> What a settlement offers is a substantive justice that may be more responsive to the parties' needs than adjudication. Settlement can be particularized to the needs of the parties, it can avoid win/lose, binary results, provide richer remedies than the commodification or monetarization of all claims, and achieve legitimacy through consent. In addition, settlement offers a different substantive process by allowing participation by the parties as well as the lawyers. Id. 33 UCLA L. Rev. at 504-05.

Additionally, settlements reduce the stress and concrescent negativity associated with protracted litigation. As Abraham Lincoln remarked, "[p]ersuade your neighbors to compromise when-

ever you can. Point out to them how the nominal winner is often a real loser--in fees, expenses, and waste of time."[10] Those entering into litigation do not do so with an attitude of insouciance; rather, they often engage their adversary with bellicosity, determined to be the victor at any price--even if that victory is a Pyrrhic one. There is frequently more than one losing party at the end of any litigation.

Protracted litigation is also counterproductive to businesses and to workers. In spending so much time and energy on the lawsuit, litigants neglect the positive and productive aspects of their lives. Those who are involved in lawsuits often do so to the detriment of their lives, their businesses and their families. It is more important for our society to encourage citizens and businesses to retreat from litigation and return to their lives. It little profits society and its citizens to be overly engaged in the business of litigation. Rather, everyone benefits

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10 This statement is quoted in Burger, supra, at 275.

from litigants resolving their disagreements, settling their disputes and returning to the business of being productive members of society.

Mindful of these principles, we foreclose the ability of dissatisfied litigants to agree to a settlement and then file suit against their attorneys in the hope that they will recover additional monies. To permit otherwise results in unfairness to the attorneys who relied on their client's assent and unfairness to the litigants whose cases have not yet been tried. Additionally, it places an unnecessarily arduous burden on an overly taxed court system.

We do believe, however, there must be redress for the plaintiff who has been **fraudulently induced** into agreeing to settle. It is not enough that the lawyer who negotiated the original settlement may have been negligent; rather, the party seeking to pursue a case against his lawyer after a settlement must plead, with specificity, fraud in the inducement. "One may not. . .induce another to contract by fraudulent misrepresentations." College Watercolor Group, Inc. v. William H.

Newbauer, Inc., 468 Pa. 103, 115, 360 A.2d 200, 206 (1976).

If the lawyer knowingly commits malpractice, but does not disclose the error and convinces the client to settle so as to avoid the discovery of such error, then the client's agreement was fraudulently obtained. This fraudulent inducement, however, does not alter the settlement agreement between plaintiff and defendant, since it is not the opposition who has committed the fraud, but the plaintiff's own lawyer. As such, the settlement agreement must be honored.

So that the plaintiff who has been defrauded may have redress, however, we would permit him to proceed under a theory of fraud against the attorney who represented him in the original action. This holding would reflect the law as it has long existed in the Commonwealth; "[i]t is scarcely necessary at this late jurisprudential hour in the day of stare decisis to cite cases to certify that fraud taints with illegality and invalidity anything its evil

shadow darkens." Iacoponi v. Plisko, 412 Pa. 576, 581, 195 A.2d 362, 365 (1963).[11]

In the event a litigant believes he has been fraudulently induced into settling, he has the right to file a suit, alleging with specificity the acts that he claims are fraudulent. If his allegations meet the standard of specificity required by Pa. R.C.P. 1019(b), then he will be allowed to proceed. In the event those allegations do not meet the standard of specificity, then the case will be dismissed upon the filing of preliminary objections.

Turning to the facts of the case currently before us, the plaintiffs have filed a complaint in which they seek damages for, inter alia, fraudulent concealment and nondisclosure. The alleged basis of this deceit is that the attorneys were negligent and in an attempt to cover up their negligence, convinced the Muhammads to agree to the settlement.

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[11] Where, however, an attorney discloses to this client that he has committed malpractice that affects the value of the case, but the client agrees to settle anyway, that client would also be barred from later suing the attorney.

The allegations, as they are set forth in the complaint, are mere suppositions. The complaint alleges a failure to sue another hospital and a drug manufacturer (arguably negligence claims) as the basis for the fraud. The fatal flaw with this bootstrapping, however, is the failure to cite with any specificity how the defendant attorneys acted with fraud as opposed to mere negligence. Rather, the complaint goes on at great length to ascribe the acts of the defendant attorneys to "evil motive with an attempt to deceive and mislead." Unless the plaintiff can more fully describe what facts support the defendant attorneys' "evil motives," we consider those allegations as nothing more than unfounded accusations which have no apparent basis in fact.[12]

Both Rule 1019(b) of the Pennsylvania Rules of Civil Procedure and case law require that fraud be

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12 We take note of the fact that the complaint forming the basis of the case before us is the plaintiffs' third attempt to draft a complaint that survives preliminary objections. The complaint we are reviewing is the plaintiffs' second amended complaint.

plead with specificity. See, e.g., Local 163, International Union of United Brewery, etc. v. Watkins, 417 Pa. 120, 207 A.2d 776 (1965). The appellees' complaint does not rise to the level of specificity that we require.[13]

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13 Aside from compelling public policy reasons for dismissal and aside from appellants' failure to plead fraud with sufficient specificity, we not that the plaintiffs have not made a prima facie showing that the alleged failings of the lawyers decreased the amount of money they would have received; they point to no articulable error--such as missing a statute of limitations or being barred from presenting expert testimony due to the failure to file an expert report--which would substantially decrease or eliminate the value of their case. There is thus a fatal failure to show the harm suffered. Because the harm suffered is so speculative, this complaint could not have survived under contract or tort principles, even if the plaintiff would have been allowed to sue on those principles. See, e.g., Mariscotti v. Tinari, 335 Pa. Super. 599, 485 A.2d 56 (1984).

It becomes obvious that by allowing suits such as this, which merely "second guess" the original attorney's strategy, we would permit a venture into the realm of the chthonic unknown. It is impossible to state whether a jury would have awarded more damages if a suit had been filed against another potential party or under another theory of liability. It is indeed possible that a smaller verdict would have been reached or a defense verdict ultimately would have been rendered. Thus, sanctioning these "Monday-morning-quarterback" suits would be to permit lawsuits based on speculative harm; something with which we cannot agree.

Accordingly, for these reasons set forth herein, we hold that the plaintiffs' complaint does not establish sufficient facts, which if proved, would entitle them to relief. Because "on the facts averred, the law says with certainty that no recovery is possible," Hoffman v. Misericordia Hospital of Philadelphia, supra, at 503, 267 A.2d at 868, we reverse the decision of the learned Superior Court and dismiss the within complaint.

It is so ordered.

Mr. Justice Larsen files a dissenting opinion in which Mr. Justice Zappala joins.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,

Appellees

vs

STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; HOWARD MESSER and JAMES THOMAS, JR.,

APPEAL OF STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; and HOWARD MESSER

No. 5, W.D. Appeal Docket 1989

Appeal from the Order of the Superior Court at No. 218 Pittsburgh, 1987, entered May 13, 1988, reversing the Order of the Court of Common Pleas, Civil Division, Allegheny County, entered January 13, 1987 at No. GD 84-6520 and remanding the case.

374 Pa. Super 613, 543 A.2d 1138 (1988)

ARGUED: March 5, 1990

DISSENTING OPINION

JUSTICE ROLF LARSEN FILED: MARCH 15, 1991

The majority has just declared a "LAWYER'S HOLIDAY.". . . It's Christmastime for Pennsylvania lawyers. If a doctor is negligent in saving a human life, the doctor pays. If a priest is negligent in saving the spirit of a human, the priest pays. But if a lawyer is negligent in advising his client as to a settlement, the client

pays. . . .Thus, "filthy lucre" has higher priority than human life and/or spirit. The majority calls this "Public Policy." Maybe ... Maybe Not?? It sure expedites injustice. Should we change the law so that non-lawyers can be judges?

I dissent.

Mr. Justice Zappala joins in this dissenting opinion.

THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

In Re: Pamela Muhammad, Administratrix of the Estate of Nazir Muhammad and Abdullah Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick, etc., et al.
Appeal of: Strassburger, McKenna, Messer, Shilobod, et al.
No. 5 W. D. Appeal Docket 1989

"PER CURIAM:

And now, this 8th day of May, 1991, the Petitioner's, Pamela Muhammad, Administratrix for the Estate of Nazir Muhammad and Abdullah Muhammad, petitions for reargument and for clarification are hereby DENIED.

It is so ORDERED."

/s/ IRMA T. GARDNER
Deputy Prothonotary

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

PAMELA MUHAMMAD, ADMINISTRATRIX OF THE ESTATE OF NAZIR MUHAMMAD AND ABDULLAH MUHAMMAD, APPELLANTS, V STRASSBURGER, MCKENNA, MESSER, SHILOBOD AND GUTNICK, A LAW PARTNERSHIP, HOWARD MESSER AND JAMES THOMAS, JR.	NO 218 PITTSBURGH 1987

ORDER

AND NOW, this 13th day of May, 1988, it is ordered as follows:

____ Order affirmed.

__X__ Order reversed. ***Case remanded for proceedings consistent with this Opinion, Jurisdiction is relinquished.***

____ Judgment affirmed.

____ Judgment of Sentence affirmed.

____ Judgment of Sentence reversed.

____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

____ Order modified as set forth in opinion filed herewith.

____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

____ Costs to be taxed as provided in the opinion filed herewith.

____ Appeal quashed.

BY THE COURT

/s/ ELEANOR R. VALECKO
DEPUTY PROTHONOTARY

PAMELA MUHAMMAD, Administratrix of the Estate of Nazir Muhammad and Abdullah Muhammad, Appellants v. STRASSBURGER, McKENNA, MESSER, SHILOBOD AND GUTNICK, A Law Partnership, HOWARD MESSER, and JAMES THOMAS, JR.	IN THE SUPERIOR COURT OF PENNSYLVANIA NO. 00218 PGH 87

Appeal from the Order entered January 13, 1987
in the Court of Common Pleas of Allegheny County,
Civil Division,
at No. GD84-6520

BEFORE: BROSKY, DEL SOLE, AND HOFFMAN, JJ.

OPINION BY HOFFMAN, J: FILED: MAY 13, 1988

This appeal is from the order below sustaining a demurrer and entering judgment in favor of appellees in a legal malpractice action. Appellants contend that the trial court erred in concluding that their cause of action is barred by this Court's prior decision in Muhammad v. Children's Hosp. of Pittsburgh, 337 Pa. Superior Ct. 635, 487 A.2d 443 (1984). For the reasons that follow, we reverse the order below and remand the case for proceedings consistent with this opinion.

The relevant procedural history, as summarized by the trial court, is as follows:

> This matter is before the court on the third preliminary objections of [appellees] to [appellants'] complaint and on [appellants'] petition for change of venue in a legal malpractice action.
>
> [Appellants] are the parents of Nazir Muhammad, who was born on November 7, 1977 and died shortly thereafter.
>
> In November of 1977, an incomplete circumcision was performed on

Nazir Muhammad at Magee-Womens Hospital. On December 16, 1977, Nazir Muhammad was operated upon again to complete the removal of his foreskin. As a consequence of the preparation for general anesthesia, he suffered pulmonary edema and died three days later in the Children's Hospital at Pittsburgh, Pennsylvania.

In March, 1978 [appellants] employed [appellee] James Thomas, Jr., [Esq.] to represent them. In October of the same year, [appellants] retained and employed [appellee] law firm and the individual member of that firm to prosecute [appellants'] claim.

On November 18, 1978, [appellees] filed a notice of complaint with the Medical Arbitration Board against Children's Hospital, and Stewart E. Price, Jr. (the urologist performing the second circumcision) and Helen Westman (the anesthesiologist attending the decedent). In April of 1979, an action was filed against the same defendants in the Court of Common Pleas of Allegheny County.

Due to [appellees'] representation and advice to [appellants], [appellants] agreed as a result of a pretrial conciliation before Judge Wekselman, to

> accept a settlement offer in the amount of $26,500.00.
>
> [Appellants] thereafter became dissatisfied with the settlement to which they had agreed and attempted to have the Court prevent enforcement of the settlement. The original complaint states that the Court by Order entered the 23rd day of April, 1982 confirmed the settlement and that the Superior Court of Pennsylvania [affirmed the order] on November 23, 1984.
>
> [Appellants] filed the action presently before the Court by praecipe on April 19, 1984. The complaint in the matter was filed on or about April 2, 1986.

Trial Court Opinion at 1-2 (footnote omitted).

The complaint set forth eight counts of allegedly wrongful conduct, deriving from appellees' prior legal representation of appellants. Appellees then raised preliminary objections in the nature of a demurrer to all counts of appellants' complaint. The trial court noted that the issue presented was "whether [appellants'] cause of action is barred by the prior opinion of the Superior Court in this

matter." Id. at 6. The court, without discussion, then entered an order sustaining appellees' demurrer and entering judgment in favor of appellees. This appeal followed.

> A preliminary objection in the nature of a demurrer is not to be sustained and the complaint dismissed unless the law says with certainty that no recovery is possible. Hoffman v. Misericordia Hosp. of Phila., 439 Pa. 501, 267 A.2d 867 (1970). Therefore, if any theory of law will support the claim raised by the [complaint], a dismissal is improper. . . .
>
> For the purpose of our review of a dismissal on the pleadings in the nature of a demurrer, the averments [in the complaint], except to the extent that they constitute conclusions of law, must be taken as true, Freezer Storage, Inc. v. Armstrong Cash Co., 476 Pa. 270, 382 A.2d 715 (1978). . . .

Cianfrani v. Commonwealth, State Employees' Retirement Bd., 505 Pa. 294, 297, 479 A.2d 468, 469 (1984). See also Aetna Electroplating Co. v. Jenkins, 335 Pa. Superior Ct. 283, 285, 484 A.2d 134, 135 (1984). When, as here, the complaint

alleges a cause of action based upon legal malpractice, three essential elements must be established:

> 1. The employment of the attorney or other basis for duty;
> 2. The failure of the attorney to exercise ordinary skill and knowledge; and
> 3. That such negligence was the proximate cause of damage to the plaintiff.

Schenkel v. Monheit, 266 Pa. Superior Ct. 396, 399, 405 A.2d 493, 494 (1979) (quoting R. Mallen & V. Levit, Legal Malpractice 123 (1977) (footnote omitted). See also ei bon ee baya ghananee v. Black, 350 Pa. Superior Ct. 134, 140, 504 A.2d 281, 284 (1986). With these principles in mind, we consider the facts presented below.

The trial court did not state the reasoning behind its conclusion that appellants' cause of action is barred by our prior decision. Following a review of the brief filed in support of appellees' preliminary objections, and the parties' briefs on appeal,

however, we can surmise that the court's decision was based on the following analysis:

> 1. Appellants, to recover in a legal malpractice action, had to show that they suffered pecuniary damages as a proximate result of appellees' prior representation;
>
> 2. To prove those damages, appellants had to show that the settlement of their previous claim, obtained through the services of appellees, was inadequate;
>
> 3. The question of the adequacy of the prior settlement was previously litigated, and that decision was affirmed by this Court in Muhammad v. Children's Hosp. of Pittsburgh, supra; and
>
> 4. Because the adequacy of the prior settlement already was litigated, appellants are barred from bringing this action under
> a. the doctrine of the law of the case, and/or
> b. the doctrine of collateral estoppel.

See Brief in Support of [appellees'] Third Preliminary Objections at 4-11; Brief for Appellants at 8; Brief for Appellees at 6.

Appellants contend that both the "law of the case" and "collateral estoppel" doctrines are inapplicable to the case at bar, and thus the trial court erred in sustaining appellees' demurrer and entering judgment in favor of appellees. We agree that the two doctrines are inapplicable.

I. LAW OF THE CASE

The "law of the case" doctrine applies only if, inter alia, the parties on the two appeals are the same. "It is hornbook law that issues decided by an appellate court on a prior appeal between the same parties become the law of the case and will not be reconsidered on a second appeal." Commonwealth v. Tick, Inc., 431 Pa. 420, 427, 246 A.2d 424, 427 (1968) (citations omitted) (emphasis supplied). See also Burke v. Pittsburgh Limestone Corp., 375 Pa. 390, 394, 100 A.2d 595, 598 (1953) ("[t]he doctrine of 'the law of the case' is that, when an appel-

late court has considered and decided a question submitted to it upon appeal, it will not, upon a subsequent appeal on another phase of the same case, reverse its previous ruling even though convinced that it was erroneous . . . .") (citation omitted) (emphasis supplied); Daniels v. State Farm Mut. Auto Ins. Co., 305 Pa. Superior Ct. 352, 356, 451 A.2d 684, 686 (1982) (same); Albright v. Wella Corp., 240 Pa. Superior Ct. 563, 567, 359 A.2d 460, 463 (1976) (same). Accord 21 C.J.S. Courts Section 195a, at 330 (1940) (" 'Law of the case' . . . means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties in the same case continues to be the law of the case . . . .") (emphasis supplied).

Here, although appellants, the Muhammads, were parties in the prior appeal, it is uncontested that appellees were not. Thus, for "law of the case" purposes, this appeal does not involve the same "case" as the prior appeal. Accordingly, we conclude that the law of the case doctrine does not bar

appellants' action, and the trial court order is not affirmable on this basis.

II. COLLATERAL ESTOPPEL

"The doctrine of collateral estoppel is a broader concept than res judicata. It operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit." Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa. Superior Ct. 225, 236, 464 A.2d 1313, 1318 (1983) (citations omitted). For the doctrine of collateral estoppel to apply, it must appear that

> 1. the fact or facts at issue in both instances were identical;
> 2. these facts were essential to the first judgment;
> 3. the parties must have had an opportunity to 'actually litigate' the issue; and
> 4. the facts were actually litigated in the first cause.

Schubach v. Silver, 461 Pa. 366, 377, 379, 336 A.2d 328, 334, 334-35 (1975). See also Matson v. Housing Auth. of Pittsburgh, 326 Pa. Superior Ct. 109, 112-13, 473 A.2d 632, 634 (1984); Long v. Long, 306 Pa. Superior Ct. 142, 144, 452 A.2d 255, 256 (1982); Lebeau v. Lebeau, 258 Pa. Superior Ct. 519, 525-26, 393 A.2d 480, 482-83 (1978); Restatement (Second) Judgments Section 27; Restatement Judgments Section 68.

Here, appellees argue that the issue common to both this appeal and the prior appeal is the question of the adequacy of the settlement of appellants' suit against Children's Hospital. Appellees maintain that this factual question has already been litigated adversely to appellants in the prior appeal. In contrast, appellants argue, inter alia, that the only factual issue presented and resolved in the former action was whether appellants had authorized appellees to settle their claim. Appellants submit that the observations made both by the trial court and this Court in the prior appeal regarding the

adequacy of the settlement were not essential to the disposition of that matter, and thus cannot preclude the litigation of the issue in this action. We agree.

In determining whether the question of the adequacy of the settlement was already decided in the prior appeal, we necessarily must examine the relevant portions of the record in the prior case. See Matson v. Housing Auth. of Pittsburgh, supra. The certified record in the instant case contains both the notes of testimony from the hearing held to determine whether the settlement should be enforced, as well as the trial court's order and opinion on the issue, and our Memorandum affirming the trial court. See Brief in Support of Third Preliminary Objections, Exhibits "A" & "B". Compare Matson v. Housing Auth. of Pittsburgh, supra.

A review of these documents reveals that appellants initially settled their medical malpractice action against Children's Hospital and the two individual defendants. The settlement was reached following a pre-trial conference. Thereafter, the

defendant hospital learned that appellants were not satisfied with the settlement, so it petitioned the trial court for a rule to show cause why the settlement should not be enforced. The court then held an evidentiary hearing, at which Pamela Muhammad, one of the appellants, testified. After the hearing, the trial court issued an order making the rule absolute, and authorized the defendants to pay into court the settlement sum. Appellants filed an appeal with this Court, and we affirmed in an unreported Memorandum.

The issue presented at the hearing held on the rule to show cause was whether counsel [appellees herein] were authorized to enter into the settlement with Children's Hospital. See N.T. April 23, 1982 at R-2. The court concluded that Pamela Muhammad had indeed authorized the settlement, noting that,

> It's the Court's conclusion from the testimony and from the in chambers discussion in which Mr. Messer indicated that he was of the belief that he

> was authorized to enter into the settlement that has been corroborated by Mrs. Muhammad who indicates that she did indeed authorize a settlement even at $23,000 if counsel felt that were the proper settlement. The only difficulty is that she has changed her mind since that time and now believes the settlement to be inadequate. Having authorized the settlement, she is not privileged to change her mind at this point. Had counsel not been authorized to enter into the settlement that, of course, would have been an entirely different matter, but the proper authority having been granted we simply cannot permit these cases to bounce around back and forth. It is the Court's view, as it was then, that the settlement agreement is a proper, just and equitable settlement in the circumstances, or the Court would not have suggested it . . . .

Id. at R-7. The court reiterated this conclusion in its opinion:

> [Mrs. Muhammad] testified that she had authorized [her] counsel . . . to enter into the settlement and that she had since had a change of mind. Her change of mind does not alter the fact that she had authorized the settlement and that, in the view of the Court, the

> settlement was indeed an advantageous one -- given the apparent difficult liability and damages questions in the case.

Trial Court Opinion May 21, 1982 at 1.

Similarly, the relevant issue presented to, and decided by, this Court on appeal, was framed by the Superior Court panel as follows:

> Appellants suggest four reasons why this Court should set aside the settlement agreement and allow the appellants to proceed to a trial on the merits. . . .[Fourth], appellants suggest that Mrs. Muhammad never expressly authorized their previous attorney . . . to settle their claim.

Muhammad v. Children's Hosp., 337 Pa. Superior Ct. 635, 487 A.2d 443 (1984), unpublished Memorandum at 2-3.[1] Our Court's entire discussion of this issue was as follows,

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[1] The other three issues presented, not relevant to this appeal, were

> 1. whether Mr. Muhammad expressly consented to the agreement;
> 2. whether the court erred in presiding over both the pre-trial conference and the evidentiary hearing; and

Appellants finally suggest that Mrs. Muhammad did not give her express consent to Mr. Messer to settle the appellants' claim. The trial court found that Mr. Messer did have this authority, and that Mrs. Muhammad had merely changed her mind after the settlement agreement had been concluded. Trial Court Opinion at 1.

Of course, an attorney may not settle his clients' claim without express authorization from his clients. Tucker v. Tucker, 370 Pa. 8, 19, 87 A.2d 650, 656 (1952). The trial court's finding, however, that Mr. Messer was authorized to settle is wholly supported by the record. In chambers, Mr. Messer informed Judge Wekselman that he believed he was authorized to settle the claim. Reproduced Record at 2. Mrs. Muhammad also testified that she authorized Mr. Messer to settle for a specific sum, but later became dissatisfied with the amount of this sum. Reproduced Record at 5. Thus, there is no reason for this Court to disturb

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3. whether the court erred in proceeding with the evidentiary hearing when Mrs. Muhammad was unrepresented by counsel.

See Muhammad v. Children's Hosp. of Pittsburgh, supra, unpublished Memorandum at 1-2.

> the trial court's factual finding that Mr. Messer had the appellants' express consent to settle the claim filed against appellees. Moreover, we agree with Judge Wekselman's assessment that the settlement was beneficial to the appellants; interests since, at trial, they would have had great difficulty in establishing that any of the appellees behaved negligently.

Muhammad v. Children's Hospital of Pittsburgh, supra, unpublished Memorandum at 6-7.

Our review of both the hearing transcript and the trial court and Superior Court opinions in the prior case convinces us that the only question essential to the decision in that case was whether appellants had authorized the settlement. Both the trial court, and the Superior Court panel recognized that, if appellants had not authorized the settlement, basis might have existed for the trial court to refuse to enforce the settlement. See, e.g., Rothman v. Fillette, 503 Pa. 259, 264, 469 A.2d 543, 545 (1983); Tucker v. Tucker, 370 Pa. 8, 19, 87 A.2d 650, 656 (1952). The trial court found, however, as a factual matter, that appellants indeed

had authorized the settlement; and, because the record "wholly supported" this finding, we affirmed.

The gravamen of appellees' collateral estoppel argument, and the basis for their preliminary objections, derives from the comments made by this Court and the trial court that the settlement was "beneficial" or "advantageous" to appellants. These comments, however, which followed the findings that appellants had authorized the settlement, were merely dictum. The comments apparently were made in reference to the testimony of Pamela Muhammad, who stated that she felt the amount of the settlement was "unfair." N.T. April 23, 1982, at R-3 to 4. The fairness or adequacy of the settlement, however, could not have been essential to the decision on the hospital's petition for a rule to show cause because, assuming appellees were authorized to settle the case, the adequacy of the settlement was irrelevant to the determination whether the hospital was entitled to have the settlement enforced against

appellants. Cf. Restatement (Second) Agency Section 15, Comment (c) ("until the [agency] agreement is rescinded, the relation continues and acts done in pursuance of it are effective as to third persons") (emphasis supplied).

Because the courts' comments regarding the adequacy of the settlement were not essential to the first judgment, they cannot act now to bar appellants under a collateral estoppel theory. See, e.g., Schubach v. Silver, supra; Matson v. Housing Auth. of Pittsburgh, supra. Accordingly, we conclude that the trial court's order sustaining the demurrer and entering judgment in favor of appellees cannot be affirmed based on collateral estoppel.

CONCLUSION

For the foregoing reasons, we hold that the trial court erred in concluding that appellants' cause of action in the instant case is barred by our prior decision in Muhammad v. Children's Hosp. of Pittsburgh. Appellants are not barred from litigating the adequacy of the settlement; thus, a demurrer

to their legal malpractice action cannot be sustained on the ground that appellants cannot prove that pecuniary damages resulted from appellees' prior legal representation. Accordingly, because we are satisfied that our prior decision does not preclude appellants from bringing this action, we reverse the order below sustaining the demurrer and entering judgment in favor of appellees, and remand the case for proceedings consistent with this opinion.[2]

Reversed and remanded. Jurisdiction is relinquished.

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[2] In their briefs filed on appeal, both parties address the question whether, assuming our prior decision does not act as a bar, appellants' complaint otherwise sets forth a valid cause of action for legal malpractice. We note, however, that the trial court explicitly based its order upon its conclusion that our prior decision in Muhammad v. Children's Hosp. of Pittsburgh bars the present action. Accordingly, we need not determine, and we express no view regarding, the question whether appellants' complaint otherwise sets forth a valid cause of action. It will be for the trial court on remand to determine whether appellants' complaint otherwise sets forth a valid cause of action for legal malpractice.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD, Plaintiffs, v. STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership, HOWARD MESSER and JAMES THOMAS, JR. Defendants.	NO. GD 84-6520

ORDER OF COURT

AND NOW, to wit, this 13th day of January, 1987, upon the preliminary objections filed by the defendants, it is hereby ORDERED, ADJUDGED and DECREED that said demurrer is sustained and judgment entered in favor of the defendants.

It is further ORDERED that plaintiffs' petition for change of venue is denied.

BY THE COURT

/s/ FINKELHOR, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,	CIVIL DIVISION
Plaintiffs,	NO. GD 84-6520
v.	OPINION AND ORDER OF COURT SUSTAINING DEFENDANTS' PRELIMINARY OBJECTIONS AND DENYING CHANGE OF VENUE
STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership, HOWARD MESSER and JAMES THOMAS, JR.	January 13, 1987
Defendants.	FINKELHOR, J.

Copies sent to:

Kenneth W. Behrend, Esq.
James R. Schadel, Esq.
James Thomas, Esq.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD, Plaintiffs, v. STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership, HOWARD MESSER and JAMES THOMAS, JR. Defendants.	NO. GD 84-6520

OPINION

FINKELHOR, J.

This matter is before the court on the third preliminary objections of defendants to plaintiffs' complaint and on plaintiff's petition for change of venue in a legal malpractice action.

Background

Plaintiffs are the parents of Nazir Muhammad, who was born on November 7, 1977 and died shortly thereafter.

In November of 1977, an incomplete circumcision was performed on Nazir Muhammad at Magee-Womens Hospital. On December 16, 1977, Nazir Muhammad was operated upon again to complete removal of his foreskin. As a consequence of the preparation for general anesthesia, he suffered pulmonary edema and died three days later in the Children's Hospital at Pittsburgh, Pennsylvania.

In March, 1978, plaintiffs employed defendant James Thomas, Jr., to represent them. In October of the same year, plaintiffs retained and employed the defendant law firm and the individual member of that firm to prosecute plaintiffs' claim.

On November 18, 1978, defendants filed a notice of Complaint with the Medical Arbitration Board against Children's Hospital, and Stewart E.

Price, Jr. (the urologist performing the second circumcision) and Helen Westman (the anesthesiologist attending the decedent). In April of 1979, an action was filed against the same defendants in the Court of Common Pleas of Allegheny County.

Due to defendants' representation and advice to plaintiffs, plaintiffs agreed as a result of a pretrial conciliation before Judge Wekselman, to accept a settlement offer in the amount of $26,500.00.

Plaintiffs thereafter became dissatisfied with the settlement to which they had agreed and attempted to have the Court prevent enforcement of the settlement. The original complaint states that the Court by Order entered the 23rd day of April, 1982 confirmed the settlement and that the Superior Court of Pennsylvania denied the appeal filed by plaintiffs relating to the settlement on November 23, 1984.

Plaintiffs filed the action presently before the Court by praecipe on April 19, 1984. The com-

plaint in this matter was filed on or about April 2, 1986.*

Defendants seek a demurrer to all counts of plaintiff's complaint. Additionally, plaintiffs seek a change of venue.

Position of the Parties

Plaintiffs seek a shift of venue in this matter from Allegheny County. Plaintiffs contend that, due to the special relationship that the judges of Allegheny County have with their fellow jurist Judge Eugene B. Strassburger III, no judge can sit on this case without an appearance of bias.

Defendants contend that plaintiffs' request is in effect, a request that the court peremptorily recuse all 43 members of this court. Defendants also seek a demurrer to all counts of plaintiffs' complaint, contending that plaintiffs have failed to establish a cause of action in this matter.

Discussion

1. Change of Venue

Plaintiffs have filed the instant action in the Court of Common Pleas of Allegheny County. They have voluntarily submitted themselves to Allegheny County jurisdiction. In the absence of gross impropriety, plaintiffs have waived all objections to venue.

As stated in the case of Alan Wood Steel Company v. School District of Philadelphia, 425 Pa. 455, 229 A.2d 881 (1967):

> "Moreover, the taxpayer voluntarily submitted itself to the jurisdiction of Philadelphia County. By the institution of its action the taxpayer waived the issue of venue." 229 A.2d at 885

In addition to the fact that plaintiff, by submitting itself to venue in the Courts of Allegheny County, has waived the issue of venue, it is also apparent to the court that plaintiff is, in effect asking for this court to grant a general recusal for all the judges in Allegheny County.

In Reilly by Reilly v. Southeastern Pa. Transp. Auth., 507 Pa. 204, 489 A.2d 1291 (1985), the Supreme Court of Pennsylvania recently set forth the procedure by which a motion to disqualify a judge is to be resolved. In Reilly, the Pennsylvania Supreme Court stated that Canon 3C of the Code of Judicial Conduct:

> ". . . does not have the force of substantive law, but imposes standards of conduct upon the judiciary to be referred to by a judge in his self-assessment of whether he should volunteer to recuse from a matter pending before him. The rules do not give standing to others, including Superior Court, to seek compliance or enforcement of the Code because its provisions merely set a norm of conduct for all our judges and do not impose substantive legal duties on them.
>
> Similarly, we have held that the Code of Professional Conduct, applicable to the conduct of attorneys does not have the force of substantive law." 489 A.2d at 1298. (Emphasis in the original.)

Plaintiffs' reliance upon Canon 3C as substantive law in their attempt to recuse all the judges of the Court of Common Pleas of Allegheny County is misplaced. Therefore, plaintiffs' request for change of venue (which is, in effect, a request for recusal), is substantively improper.

In Reilly, supra., the Supreme Court also stated:

> ". . . it is still the duty of the party, who asserts that a judge should be disqualified, to allege by Petition, the bias, prejudice or unfairness necessitating recusal. Commonwealth v. Darush, Id.; Commonwealth v. Perry, Id. A failure to produce a sufficient plea will result in a denial of the recusal motion." 489 A.2d at 1299.

Plaintiffs allege that members of the defendant law firm share social, familial and economic relationships with all of the members of the bench in the Court of Common Pleas of Allegheny County. When a charge of disqualification is made against a Judge, the party must produce specific allegations supported by evidence which has a tendency to show bias, prejudice or unfairness. In the present

matter, plaintiffs have failed to allege any facts which would support a petition for change of venue based on the recusal of all of the judges in Allegheny County.

Plaintiffs' petition for change of venue on the basis of recusal is also improper procedurally. In Reilly, supra., the Court stated:

> "The proper practice on a plea of prejudice is to address an application by petition to the judge before whom the proceedings are being tried. He may determine the question in the first instance, and ordinarily his disposition of it will not be disturbed unless there is an abuse of discretion." 489 A.2d 1299.

According to this case, Plaintiffs' petition for change of venue is premature. This case has not yet been assigned to a trial judge and it is improper for the Court at this time to grant a "blanket" recusal of all judges in Allegheny County by shifting the venue in this action to a different county. Therefore, plaintiffs' petition for change of venue is denied in the present matter.

2. Preliminary Objections

Defendant has also raised preliminary objections in the nature of a demurrer to all counts of plaintiffs' complaint. The issue is whether plaintiff's cause of action is barred by the ***prior*** opinion of the Superior Court in this matter. See Muhammad v. Children's Hospital, No. 601 Pittsburgh 1982 (Slip Opinion). Said demurrer is sustained and an appropriate Order is attached hereto.

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* Plaintiffs' complaint in the present matter consists of eight counts:

I. Fraudulent Misrepresentation (Deceit)
II. Fraudulent Concealment (Deceit)
III. Nondisclosure
IV. Breach of Contract
V. Negligence - But For Standard
VI. Negligence - Substantiated Facts Standard
VII. Outrageous Conduct Causing Severe Emotional Distress
VIII. Breach of Fiduciary Obligation

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

PAMELA MUHAMMAD, administratrix of the Estate of NAZIR MUHAMMAD, and ABDULLAH MUHAMMAD, Plaintiffs, vs. STRASSBURGER, MCKENNA, MESSER, SHILOBOD AND GUTNIK, a law Partnership, HOWARD MESSER, and JAMES THOMAS, JR., Defendants. JURY TRIAL DEMANDED	CIVIL DIVISION GD 84-6520 Code 011 SECOND AMENDED COMPLAINT Filed on behalf of: Pamela Muhammad, Administratrix of the Estate of Nazir Muhammad, and Abdullah Muhammad Counsel of Record for Party: Kenneth W. Behrend, Esquire Pa. I.D. No. 00406 BEHREND, MORAN, ERNSBERGER & TAMILIA Firm I.D. No. 018 1320 Grant Building Pittsburgh, PA 15219

ACCEPTANCE OF SERVICE

I CERTIFY THAT A TRUE AND CORRECT COPY OF THE WITHIN PLEADING WAS MAILED POSTAGE PREPAID TO ADVERSE COUNSEL THIS ***19*** DAY OF ***May***, 19***91***

/s/ Kenneth W. Behrend
ATTORNEY FOR ***Plaintiff***

SECOND AMENDED COMPLAINT

This action is brought on behalf of the Plaintiffs by and through their lawyer, Kenneth W. Behrend and the law firm of Behrend, Moran, Ernsberger & Tamilia. The statement of their injuries and damages and the basis in fact and law under which they are entitled to recover are set forth below.

1. Plaintiff, Pamela Muhammad is the mother of the deceased, baby boy, Nazir Muhammad. She is the Administratrix of his estate, No. 5024 of 1978. She and Abdullah Muhammad, now divorced, were married at the time of the birth and death of Nazir Muhammad. Pamela Muhammad, at all times material, hereto, and at the present time, is a resident of Allegheny County, Pennsylvania.

2. Abdullah Muhammad is the father of the deceased baby boy, Nazir Muhammad. He is a resident of Denver, Colorado.

3. Strassburger, McKenna, Messer, Shilobod and Gutnik, is a partnership of lawyers organized to practice Law. Howard Messer is a partner and

an individual defendant. They maintain an office in Pittsburgh, Pennsylvania.

4. At all times material, hereto, the firm of Strassburger, McKenna, Messer, Shilobod and Gutnik and Howard Messer held themselves out as lawyers and experienced practitioners specializing in Medical Malpractice cases; possessing superior knowledge and skill in such cases.

5. Defendant, James Thomas, Jr., is a lawyer with an office in Pittsburgh, Pennsylvania. At all times material hereto he was engaged in the general practice of the law.

6. Nazir Muhammad, the deceased son of Pamela Muhammad and Abdullah Muhammad, was born November 7, 1977. He died December 19, 1977, in The Children's Hospital, at Pittsburgh, Pennsylvania.

7. In November of 1977, an incomplete circumcision was performed at the Magee-Womens Hospital on Nazir Muhammad by an employee-surgeon of the hospital, who was authorized to per-

form the operation in the scope of his employment. The attempted circumcision was negligently performed, in that, it was not done according to the standard of a reasonable man using due care under the circumstances. The technique of operation deviated from the required standard of care, which was to remove the proper amount of foreskin in one operation. The operation resulted in the removal of an insufficient amount of foreskin and causing his penis to have a redundant prepuce with phimosis, a condition of his penis that threatened the integrity of the penis and presented a hygiene and health hazard.

8. On December 16, 1977 at the Children's Hospital of Pittsburgh, Nazir Muhammad was operated upon again to complete the removal of the foreskin. As a consequence of succinylcholine given to him in preparation for general anesthesia he suffered fatal pulmonary edema. He lingered until December 19, 1977, and died from pulmonary insufficiency.

9. In the month of March, 1978, Plaintiffs retained and employed defendant, James Thomas, Jr., to represent them in a claim arising from the death of their infant son, Nazir Muhammad.

10. In the month of October, 1978, Plaintiffs, at the urging of defendant, James Thomas, Jr., retained and employed the defendant law firm and the defendant individual member of that firm to prosecute the claim arising from the death of their infant son, Nazir Muhammad.

11. The defendants had The Register of Wills of Allegheny County on October 26, 1978, at Number 5024 of 1978, grant Letters of Administration unto Abdullah Muhammad. Abdullah Muhammad, subsequently, on July 3, 1984, renounced his rights to administer the estate of his son, Nazir Muhammad, and resigned, giving the duties of Administratrix of the said estate to Pamela Muhammad, the mother of the decedent.

12. On November 18, 1978, Defendants filed Notice of Complaint with the Medical Arbitration

Board on behalf of Plaintiffs against; Children's Hospital of Pittsburgh, Stuart E. Price, Jr., M.D., and Helen Westman, M.D.

13. On April 13, 1979, Defendants filed a Complaint in the Court of Common Pleas of Allegheny County, Pennsylvania, on behalf of Plaintiffs against; Children's Hospital of Pittsburgh, Stuart E. Price, Jr., M.D., and Helen Westman, M.D.

14. The defendants did not file suit within the applicable Statue of Limitation period against Magee-Womens Hospital or its employee-surgeon on a cause of action based on the negligent attempt to remove the foreskin. If the defendants had timely filed a complaint alleging the negligence described in paragraph 15, followed with the required trial preparation, the Plaintiffs would have prevailed in a trial by jury. The Plaintiffs would have recovered damages on behalf of the Estate of Nazir Muhammad for: loss of wages and earnings for the natural life expectancy of the decedent (an

amount substantially in excess of $26,500), for monies expended for medical bills, funeral expenses, headstone and administration expenses; for pain and suffering and inconvenience on behalf of the decedent from the date of the defendants acts until his death, substantially in excess of $26,500, by jury trial or by settlement. Additionally, damages would have been recovered by Plaintiffs as parents for the loss of decedent's society, companionship, services, aid and comfort, assistance, wages and their pecuniary losses, either by jury trial or settlement, substantially, in excess of $26,500. Such damages were collectable from Magee-Womens Hospital or its employee-surgeon by reason of insurance and the Catastrophe Loss Fund.

15. The Magee-Womens Hospital by its employee-surgeon deviated from the required standard of care due to Nazir Muhammad because he did not possess the requisite knowledge and skill to do the foreskin operation and he did not perform it as required and remove the foreskin to be removed

in one operation and he did not act as a reasonable man under the circumstances with due regard for the care owed to Nazir Muhammad. The Plaintiffs would have prevailed in a trial by jury against Magee-Womens Hospital and the employee-surgeon. The Plaintiffs would have recovered damages against Magee-Womens Hospital and the employee-surgeon on behalf of the Estate of Nazir Muhammad for: loss of wages and earnings for the natural life expectancy of the decedent (an amount substantially in excess of $26,500), for monies expended for medical bills, funeral expenses, headstone and administration expenses; for pain and suffering and inconvenience on behalf of the decedent from the date of the defendants acts until his death, substantially in excess of $26,500, by jury trial or by settlement. Additionally, damages would have been recovered by Plaintiffs as parents for the loss of decedent's society, companionship, services, aid and comfort, assistance, wages and their pecuniary losses, either by jury trial or settlement, substan-

tially, in excess of $26,500. Such damages were collectable from Magee-Womens Hospital or its employee-surgeon by reason of insurance and the Catastrophe Loss Fund.

16. The succinylcholine as consumed by Nazir Muhammad was in the same condition as manufactured and sold. It was used for the purpose for which it was intend as a pre-anesthesia agent. It contained a defect. The chemical makeup was such that it would react, with children's bodies and lungs to create a life threatening and, in this instance, a life destroying condition of pulmonary edema. No warning of this dangerous deficit was affixed to the product by way of labelling or by package insert. The Plaintiffs would have prevailed in a trial by jury against the manufacturer-seller and the Children's Hospital, if suit would have been filed within the time permitted by the applicable Statute of Limitations. The Plaintiffs would have recovered damages on behalf of the Estate of Nazir Muhammad against the manufacturer-seller and

Children's Hospital for: loss of wages and earnings for the natural life expectancy of the decedent (an amount substantially in excess of $26,500), for monies expended for medical bills, funeral expenses, headstone and administration expenses; for pain and suffering and inconvenience on behalf of the decedent from the date of the defendants acts until his death, substantially in excess of $26,500, by jury trial or by settlement. Additionally, damages would have been recovered by Plaintiffs as parents for the loss of decedent's society, companionship, services, aid and comfort, assistance, wages and their pecuniary losses, either by jury trial or settlement, substantially, in excess of $26,500. Such damages were collectable from the manufacturer-seller of succinylcholine and Children's Hospital by reason of insurance or attachable assets.

17. The Plaintiffs were unaware of the harm done to them by the defendants until the month of May 1982 and could not have and did not discover the harm by reason of the deception of the defen-

dants in not disclosing their negligence and that in giving an altogether false opinion as to the worth of the suit.

COUNT I

FRAUDULENT MISREPRESENTATION

(DECEIT)

18. Paragraphs 1 through 17 are incorporated by reference, hereto, as though they were set forth, herein, at length.

19. The defendants have acted with evil motive, with intent to deceive and mislead Plaintiffs, to Plaintiffs' harm.

20. Defendants made fraudulent misrepresentations at the outset, throughout and at the termination of the attorney-client relationship by making false and misleading misrepresentations of fact, opinion and intention. The details of which are described in Paragraphs 21 through 26.

21. The Defendants misrepresented their performance as the Plaintiffs' lawyers as though they did all things required of them by the relationship

of attorney and client, when in fact, they had been careless in their work as it is set forth in detail in Count V, Negligence; and, the defendants urged a settlement on the Plaintiffs with evil motive, falsely telling them that a jury would not award more than the $26,500 offered because they were poor and black, when, in fact and in opinion, they had no rational basis for saying this. Their purpose in making the utterance was to have the Plaintiffs accept the settlement; planning, thereby, that their negligence and the harm done, therefrom, would go unnoticed or that they could secure a settlement that would foreclose the Plaintiffs from redress against them.

22. Defendants made additional misrepresentations of fact which were altogether untrue, false, misleading and fraudulent. They asserted that they were pursuing a claim based on lack of informed consent because of failure to advise, "the parents of the decedent of the dangers and/or risks involved in a repeat circumcision or in the propriety of admin-

istering general anesthesia, to perform a circumcision, and failed to obtain the informed consent of the decedent's parents or guardians, to such a procedure". In fact, the defendants did not procure expert testimony to establish this proposition, nor file such expert report to permit such evidence to be introduced at trial. The defendants also asserted contrary to fact that they had brought action on behalf of the Plaintiffs on all applicable theories of action, against all possible parties.

23. Defendants made the following misrepresentations of opinion which were altogether, untrue, false, misleading and fraudulent:

a. that the Plaintiffs should accept a settlement of $26,500 because in the opinion of the defendants a jury would award no greater amount because they were poor and black.

b. that the defendants had brought suit under all theories of liability against all parties who were potentially responsible for the death of Nazir Muhammad.

24. The defendants had no basis for offering an opinion that they had sued all the potentially responsible parties under all applicable theories of liability, but continued to offer such opinion when it was clear that they had not. They then ventured the opinion about the Plaintiffs being poor and black limiting the possible recovery to $26,500. They offered this opinion, not because they believed it or had any basis in fact upon which to base such belief, but because they sought to mislead the Plaintiffs to enter into a settlement to their harm.

25. The defendants made the misrepresentations of intention that they intended to prosecute fully any and all claims arising out of the death of Nazir Muhammad through a jury trial, if necessary. This was altogether untrue, false, misleading and fraudulent; the intention of the defendants was to only pursue the claims of the Plaintiffs, only to the extent that they could settle such claims without a jury trial.

26. The defendants entered into the representation agreement having no intention to try the case before a jury, but to settle for what settlement might be obtained with the least effort and most profit for them. Subsequently, they reinforced their intent not to prepare the case for trial and to cause the Plaintiffs to settle for $26,500; the defendants had the intent to cause the Plaintiffs to settle for $26,500 to avoid their negligence from being discovered and to prevent the Plaintiffs from maintaining a law suit against them; the defendants did not have the intent to properly prepare the investigation of the cause of death and to obtain complete expert advice, but intended to handle the case in a time-cost effective manner, providing for the most possible money being earned by them in relation to the work performed; with inadequate preparation and the saving on expenditures for expert opinion and investigation to maximize the monetary return to them, without regard to obtaining adequate damages.

27. The Plaintiffs were deceived by the defendants and entered into a representation agreement with the defendants under the belief that the defendants would fairly represent them and that the defendants intended to prepare for a jury trial and be ready to try the case; and that the defendants intended to settle the case without trial was not communicated to them at the outset.

28. The Plaintiffs justifiably relied on the defendants, who were their lawyers, to their harm.

29. The Plaintiffs in their representative capacity have suffered damage as a direct and proximate result of the fraudulent concealment and misrepresentations of the defendants. But for the acts of the defendants, damages would have been recovered by Plaintiffs as parents for the loss of decedent's society, companionship, services, aid and comfort, assistance, wages and their pecuniary losses, either by jury trial or settlement, substantially in excess of $26,500; they would have prevailed in a jury trial that included the omitted defendants, identified

herein, with the inclusion of all the theories of recovery; they would have recovered substantially in excess of $26,500 by verdict or by settlement in their representative capacity and substantially in excess of $26,500 by verdict or by settlement as parents.

30. The Plaintiffs have been put to grievous trouble, vexation and annoyance which have been caused by Defendants' deceit.

31. The Plaintiffs are entitled to compensatory damages, including attorneys fees and pre-judgment interest.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory damages in an amount in excess of $20,000, together with delay damages.

COUNT II

FRAUDULENT CONCEALMENT

(DECEIT)

32. Paragraphs 1 through 17 are incorporated by reference, hereto, as though they were set forth, herein, at length.

33. Defendants, concealed from the Plaintiffs material information essential to making an informed decision as to whether the Plaintiffs should give consent to the proffered settlement of $26,500. They concealed this material information from the Plaintiffs by not informing them as was required of them as the Plaintiffs' attorneys and with the certain knowledge that Plaintiffs could not be expected to learn of the concealment.

34. Acting with evil motive, with intent to deceive and mislead, the defendants concealed the material information contained in Count V, Negligence and set forth in Paragraphs 21, 22, 23, 24, 25 and 26.

35. The defendants did not inform the Plaintiffs of the consequences of the ostensible settlement assent by the Plaintiffs until after assent was given. They did not inform the Plaintiffs that the communication of an agreement of settlement to the Court by the defendants, as lawyers for the Plaintiffs, could bind the Plaintiffs to that settlement, with respect to proceeding on the claim filed stemming from the death of Nazir Muhammad.

36. Incorporated, herein, by reference thereto as though set forth in their entirety are paragraphs 27, 28, 29, 30, and 31.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory damages in an amount in excess of $20,000, together with delay damages.

COUNT III

NONDISCLOSURE

37. Paragraphs 1 through 35 are incorporated, herein, by reference thereto as though they were fully set forth in their entirety.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for pecuniary loss in an amount in excess of $20,000 together with delay damages.

COUNT IV

BREACH OF CONTRACT

38. Paragraphs 1 through 17 are incorporated by reference, thereto, as though they were set forth, herein, at length.

39. The agreement between the Plaintiffs and defendants was in part written and in part oral. A true and correct copy of the written portion, dated March 17, 1978, is attached hereto and designated, Exhibit "A". The oral portion was entered into at a later date, in the month of October, 1978.

40. The terms of the agreement between the Plaintiffs and defendants are that:

a. The defendants would perform in their representation of the Plaintiffs as attorneys skilled and experienced in medical malpractice litigation;

b. The defendant law firm and individual law firm member, defendant, would perform in their representation as attorneys who were specialists in medical malpractice litigation;

c. The defendants would pursue the Plaintiffs' claim with due diligence;

d. The defendants would conduct a thorough and diligent search of the underlying facts of the claim, which included a search of all hospital records, a medical journal and medical text search of surgical procedure, anesthesia procedure, and medication given;

e. The defendants would seek expert information from scientists and medical doctors knowledgeable in the field of circumcision surgery, pediatric anesthesiology and pharmacology;

f. The defendants would inquire of the putative defendants before suit entered for an explanation of the cause of death of Nazir Muhammad.

g. The defendants would inquire of the defendants in any suit filed by court permitted discovery, timely made, of the cause of injury;

h. The defendants would give advice and opinion, only after a thorough research of the law and facts and an intelligent decision reached therefrom;

i. The defendants would investigate all possible claims and causes of action on behalf of the Plaintiffs and render opinions after reaching an intelligent decision as to what causes of actions existed and with respect to what causes and course of action should be pursued.

41. The defendants breached all of the promises, terms and conditions set forth in paragraph 40, above to the pecuniary loss of the

Plaintiffs, including attorneys fees and pre-judgment interest.

42. As a result of the breach of agreement by the defendants, the Plaintiffs suffered pecuniary loss in an amount in excess of $20,000 plus the interest thereon from April 23, 1982.

43. Paragraph 29 is incorporated, herein, by reference thereto as though set forth at length.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for pecuniary loss in an amount in excess of $20,000 together with interest thereon from April 23, 1982.

COUNT V

NEGLIGENCE - BUT FOR STANDARD

44. Paragraphs 1 through 17 are incorporated herein by reference, thereto, as though they were set forth at length.

45. The Plaintiffs assert that had the defendants timely brought suit against the parties omitted and

upon the causes of action omitted, as described above in paragraphs 14, 15 and 16, a verdict or settlement in their favor in excess of $26,500 would have been recovered.

46. Further, the defendants did not pursue the cause of action filed based on lack of informed consent. The defendants asserted it in paragraph 17 of the complaint they prepared and filed by saying:

> "At the time of the admission none of the defendants advised the parents of the decedent, of the dangers and/or risks involved in a repeat circumcision or in the administration of general anesthesia, or in the propriety of administering general anesthesia, to perform a circumcision, and failed to obtain the informed consent of the decedent's parents or guardians, to such a procedure."

They were negligent because they did not file an expert report in compliance with Allegheny County Rules of Civil Procedure, Rule 212, permitting testimony explaining the risks between local and general anesthesia and the applicability of each.

47. The defendants were negligent in that they did not exercise the requisite skill and knowledge necessary to represent the Plaintiffs in their claim for the death of the infant, Nazir Muhammad. They did not act as reasonable men under the circumstances.

48. The defendants committed further acts of negligence in that:

a. they failed to make any investigation of medications administered to Nazir Muhammad at The Children's Hospital of Pittsburgh associated with the anesthesia procedure; specifically, succinylcholine;

b. they failed to take timely depositions, which, when taken, revealed the harm and death caused by the administration of succinylcholine;

c. they failed to attempt to discover what was discoverable about succinylcholine: that it was sold containing a defect that could cause death in an infant and that defect was not warned of in the package insert nor who was the manufacturer and

who were the sellers, within the time permitted by the applicable Statute of Limitations;

d. they failed to bring suit or give advice pertinent to bringing suit against Magee-Womens Hospital and its employee-surgeon for the negligence in performing the original incomplete circumcision, within the time permitted by the applicable Statute of Limitations;

e. they failed to bring suit or give advice pertinent to the bringing of suit against the sellers of the succinylcholine, including The Children's Hospital of Pittsburgh and the manufacturer-seller, with the time permitted by the applicable Statute of Limitations;

49. Despite the holding forth of such skill the defendants did not possess or exercise the knowledge and skill of a specialist in medical malpractice cases.

50. The defendants did not possess the ordinary skill and knowledge required of them to represent the Plaintiffs in a medical malpractice action.

51. The defendants did not possess the required skill and knowledge to comprehend the patient (hospital) charts, of Nazir Muhammad; to uncover and understand adverse reactions of medications and anesthesia in children; to select the correct skilled help in analyzing the medical facts; to obtain and comprehend the manufacturer's package insert of succinylcholine; to inquire and understand the significance of the failed circumcision.

52. The negligence of the defendants was the legal cause of the Plaintiffs suffering pecuniary loss.

53. The Plaintiffs assert that the defendants did not bring suit against the parties omitted and upon the causes of action omitted, as described above, and did not pursue with due diligence the cause of action for lack of informed consent and, therefore, are proximately liable to the Plaintiffs for the pecuniary loss suffered.

54. But for the negligence of the defendants the Plaintiffs would have been successful at a jury trial

as described in paragraphs 14, 15, 16 and 46 and would have recovered at jury trial a sum substantially in excess of $26,500, by jury verdict in their representative capacity and a sum substantially in excess of $26,500 by verdict as parents and would have collected the same.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory damages in an amount in excess of $20,000, together with delay damages.

COUNT VI

NEGLIGENCE - SUBSTANTIATED FACTS STANDARD

55. Paragraphs 44 through 53 are incorporated, herein, by reference, thereto, as though they were set forth at length.

56. The defendants increased, in a substantial, practical way the risk that the Plaintiffs would suffer damages by not receiving the compensation to which they were entitled to receive, either by set-

tlement or verdict, if suit had been filed against the omitted parties and upon the causes of action omitted.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory damages in an amount in excess of $20,000, together with delay damages.

COUNT VII
OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS

57. Paragraphs 1 through 42 are incorporated, herein, by reference, thereto, as though they were set forth at length.

58. The defendants by extreme and outrageous conduct, with evil motive, intentionally and/or recklessly caused the Plaintiffs to suffer severe emotional distress by:

a. counseling the Plaintiffs falsely with evil motive that the sum of $26,500 is all the money that a jury would award for the death of their son

Nazir, because they are poor and black and that they should; therefore, settle for this amount;

b. urging the Plaintiffs to settle so as to cover-up their malpractice;

c. not informing the Plaintiffs that the assent they gave their lawyers to settle when communicated to the Court would forever bind them;

d. not disclosing to the Court during the hearing to enforce the settlement that the Plaintiffs' assent to settle was urged upon the Plaintiffs by Howard Messer and the law firm of Strassburger, McKenna, Messer, Shilobod and Gutnik;

e. the giving of altogether false opinions as to the merit and value of the case;

f. not disclosing to the Plaintiffs or the Court before or during the hearing to enforce the settlement, that the defendants Howard Messer and the law firm of Strassburger, McKenna, Messer, Shilobod and Gutnik, had failed to file suit against Magee-Womens Hospital and its employee-surgeon for the negligently performed circumcision and that

this would substantially increase the value of Plaintiffs case;

g. not disclosing to the Plaintiffs or to the Court that the defendants Howard Messer and the law firm of Strasssburger, McKenna, Messer, Shilobod and Gutnik, had failed to timely investigate the cause of Nazir Muhammad's death and had they done so by taking a timely deposition of Helen Westman they would have discovered that the succinylcholine was responsible for the death of their son and that this would have led to a products liability action against Children's Hospital and the manufacturer-seller of succinylcholine and that this would substantially increase the value of Plaintiffs' case;

h. and in failing to inform the Court during the hearing to enforce the settlement that the defendants, Howard Messer and the law firm of Strassburger, McKenna, Messer, Shilobod and Gutnik, were in violation of Allegheny County Rules of Civil Procedure, Rule 212, which required

an expert opinion to be obtained and filed with regard to that portion of the complaint which states that the informed consent of the Muhammads was never obtained by the Children's Hospital, Dr. Price or Dr. Westman for the use of general anesthesia for this minor surgical procedure.

59. The Plaintiffs suffered emotional shock as a result of the defendants intentional outrageous conduct as described.

60. The conduct of the defendants was so extreme and outrageous that they are liable to the Plaintiffs for the emotional distress because of their conduct alone, whether or not the Plaintiffs suffered actual emotional shock.

61. The Plaintiffs are entitled to compensatory damages.

62. Exemplary damages must be awarded against the defendants to discourage their willful and wanton misconduct in violation of their fiduciary obligation.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory damages, in an amount in excess of $20,000, together with delay damages.

COUNT VIII

BREACH OF FIDUCIARY OBLIGATION

63. Paragraphs 1 through 17 and 57 through 62 are incorporated by reference, thereto, as though they were set forth, herein, at length.

64. The defendants, in an attorney and client relationship with the Plaintiffs were under a fiduciary obligation of the highest order. They violated this trust when they undertook representation of the Plaintiffs with the undisclosed intent of not to prosecute their claim to jury verdict, when they did not disclose their inept and negligent representation to the Plaintiffs, when they gave from evil motive the opinion that the Plaintiffs were limited in their claim to $26,500 because they were poor and black, and when at the hearing to enforce the settlement

they did not disclose to the court how they obtained an utterance of consent from the wife-Plaintiff.

65. The Plaintiffs are entitled to compensatory damages equal to the amount they would have recovered, either by jury trial or settlement, and counsel fees and pre-judgment interest.

66. Exemplary damages must be awarded against the defendants to discourage their willful and wanton misconduct in violation of their fiduciary obligation.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory and punitive damages in an amount in excess of $20,000 plus delay damages.

BEHREND, MORAN, ERNSBERGER & TAMILIA, Attorneys for Plaintiffs,

By: /s/ Kenneth W. Behrend

JURY TRIAL DEMANDED

JAMES THOMAS, JR.
Attorney at Law
Suite 530 Grant Building
Pittsburgh, Pennsylvania 15219
(412) 562-0223

POWER OF ATTORNEY

AND

CONTINGENT FEE AGREEMENT

KNOW ALL MEN BY THESE PRESENTS: That, I (we), the undersigned, do authorize and appoint, JAMES THOMAS, JR., Attorney at Law, to represent me (us) in all matters pertaining to my (our) claim and/or suit for damages against ***Children's Hospital of Pittsburgh, et al*** (or the appropriate parties), arising from an incident or contract on ***12/19***, 1977, with full power to act for me (us) and in my (our) behalf or to effect an amicable settlement if possible.

IT IS FURTHER AGREED that I (we) direct that said Attorney shall receive for professional

EXHIBIT "A"

services, forth (40%) percent of any gross recovery, whether by settlement or verdict, and further, that said Attorney, in addition thereto, shall be reimbursed for all costs actually incurred in the furtherance of this legal cause. This agreement does not include appeals.

IN THE EVENT there is no recovery, said Attorney shall not be entitled to any fee for services rendered, costs incurred excepted.

IT IS DISTINCTLY UNDERSTOOD that said Attorney are not authorized to make any settlement or compromise without my (our) consent.

IN WITNESS WHEREOF, I (we) have set my (our) hand(s) and seal(s) this ***17th*** day of ***March***, 19***78***.

WITNESS:

_____ _____ (SEAL)

_____ _____ (SEAL)

_____ _____ (SEAL)

EXHIBIT "A"

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: SS:
COUNTY OF ALLEGHENY :

Personally appeared before me, the undersigned authority, a notary public in and for said commonwealth and county, Naimah Pamela Muhammad, who being duly sworn according to law, deposes and states that the allegations of fact set forth in the foregoing Second Amended Complaint are true and correct to the best of her knowledge, information and belief.

/s/ PAMELA MUHAMMAD

Sworn and subscribed

before me this 19th day

of May, 1986.

/s/ HARRY FENTON

Commission expires

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

PAMELA MUHAMMAD, administratrix of the Estate of NAZIR MUHAMMAD, and ABDULLAH MUHAMMAD,	CIVIL DIVISION
	G.D. 84-6520
	Code: 011
Plaintiffs,	BRIEF IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS
vs.	
STRASSBURGER, MCKENNA, MESSER, SHILOBOD AND GUTNIK, a law Partnership, HOWARD MESSER, and JAMES THOMAS, JR.,	Filed on Behalf of: Pamela Muhammad, Adminsitratrix of the Estate of Nazir Muhammad and Abdullah Muhammad.
Defendants.	Counsel of Record for This Party: Kenneth W. Behrend, Esq. Pa. I.D. No. 00406
	BEHREND, MORAN, ERNSBERGER & TAMILIA FIRM NO. 018 1320 Grant Building Pittsburgh, PA 15219 (412) 391-2515
JURY TRIAL DEMANDED	

ACCEPTANCE OF SERVICE
I CERTIFY THAT A TRUE AND CORRECT COPY OF THE WITHIN PLEADING WAS ***HAND DELIVERED*** TO ADVERSE COUNSEL THIS ***16TH*** DAY OF ***JUNE***, 19***86***.

/S/ KENNETH W. BEHREND
ATTORNEY FOR ***PLAINTIFFS***

BRIEF IN OPPOSITION OF DEFENDANTS' PRELIMINARY OBJECTIONS

Introduction

This is a legal malpractice action which arises from the defendants' legal representation of the plaintiff, Pamela Muhammad and her husband Abdullah Muhammad, in a medical negligence for claims arising from the death of their infant son Nazir. Nazir Muhammad died on December 19, 1977, as the result of anesthesia given during an operation to correct a persistent prepuce. He was approximately four weeks of age.

On November 18, 1978, the defendants in this action filed a Notice of Complaint with the medical arbitration board against Childrens' Hospital and Dr. Helen Westman (the anesthesiologist) and Dr. Stuart E. Price (the surgeon). In April, 1979, an action was filed against these defendants in the Court of Common Pleas of Allegheny County.

On April 22, 1981, some 3 1/2 years after the death of Nazir Muhammad, the defendants' lawyer in the instant action, took the deposition of the

anesthesiologist Dr. Helen Westman. At that time it was learned from Dr. Westman that an adverse drug reaction to Succinylcholine was the cause of the death of Nazir Muhammad.

Defendant, Howard Messer, and the law firm of Strassburger, McKenna, Messer, Shilobod and Gutnick made no further inquiry into the adverse drug reaction to Succinylcholine, and its role in the death of Nazir Muhammad. Nor did they inform Mrs. Muhammad of Dr. Westman's opinions as to the cause of death.

In April, 1982, defendant Messer and his law firm induced Mrs. Muhammad to settle their case against Childrens' Hospital and Drs. Westman and Price for $26,500.00. The defendants intentionally deceived the plaintiff as to the value of the case. They were told that they could expect to receive no more that $26,500 for the death of their son because they are poor and black and because of that a jury would award them no more. The defendants purpose in deceiving the plaintiff was to hide from

the plaintiffs their negligence and ineptness and to prevent any cause of action against themselves.

Mrs. Muhammad told the defendants in the settlement negotiations to "do what they felt best," believing that the defendants had adequately investigated all potential theories of liability and putative defendants. The plaintiffs subsequently became dissatisfied with the amount of settlement and attempted to have the settlement set aside. A hearing on the issue of whether the settlement should be enforced was held before Judge Wekselman where the wife plaintiff went unrepresented by counsel. The settlement was enforced by order of Judge Wekselman on April 23, 1982.

Thereafter, the Plaintiffs sought the services of present counsel to appeal Judge Wekselman's order. On November 23, 1984, the Superior Court of Pennsylvania affirmed that Court Order.

The Complaint filed against the defendant Messer and his law firm outlines the defendants deviations from the required standard of care that was owed to the plaintiffs. In particular, the com-

plaint states that the plaintiffs were fraudulently induced by the defendants to settle their claims against Childrens' Hospital and Drs. Westman and Price by telling the Muhammads to accept the $26,500.00 as a settlement because the jury would award no more than that because they were poor and black. This was an altogether false opinion and was done to prevent the plaintiffs from discovering that the defendants had been negligent in their prosecution of this case. This being a clear violation of a lawyers fiduciary duty to his client.

The Complaint further states that the defendants failed to file actions against Magee-Womens Hospital and its employee surgeon for failing to perform a proper circumcision in the first instance. The defendant lawyers were negligent in failing to file these actions and in failing to advise the plaintiffs of the reasons for not doing so.

The complaint further states that the defendants failed to perform timely discovery in that they took the deposition of Dr. Westman on April 22, 1981. This was some 2 1/2 years after filing the notice of

complaint against the hospital and doctors and some 3 1/2 years after the death of Nazir Muhammad. Had they taken a timely deposition of Dr. Westman, they would have discovered that it was Dr. Westman's opinion that the cause of the infant Muhammad's death was an adverse drug reaction to Succinylcholine causing pulmonary edema. Pulmonary edema was not an adverse reaction that was warned of by the manufacturer. If the defendants had taken a timely deposition of Dr. Westman it would have lead to a products liability action against the manufacturer of the Succinylcholine prior to the passing of the statute limitations.

The complaint further states that the defendants, although they plead the lack of informed consent for the use of general anesthesia as opposed to the use of local anesthesia for a circumstances, failed to, in accordance with local rule of Civil Procedure 212, engage an expert to proceed on this cause of action.

Defendant in the instant action have maintained in their Brief In Support Of Preliminary

Objections, that theories of issue preclusion, prevent the plaintiffs from bringing the present action because the Courts have approved the settlement as beneficial and advantageous to the plaintiff.

THERE ARE TWO CONSTELLATIONS OF WRONG: ONE GROUP CENTERS ABOUT THE SUIT THAT WAS FILED AND THE OTHER GROUP FOCUSES ON THE SUITS NOT FILED

Assuming, arguendo, that the court approved settlement terminates all claims that stem from the fraud in obtaining the consent of the plaintiffs, such settlement does not bar the claims for not filing suit against the Magee-Womens Hospital, the employee-physician, and the manufacture of succinylcholine.

The latter three putative wrongdoers committed such separate acts, that they could not take advantage of any settlement or release entered into. A jury would not have found the three asserted wrongdoers against whom suit was actually filed to be liable. A jury would not have found, that Children's Hospital of Pittsburgh, Stuart E. Price, and Helen Westman were negligent. That is pre-

cisely why the Defendants persuaded the Plaintiffs to settle. An action for negligence was all the defendants preserved for trial.

It is Hornbook Law that for a tortfeasor to be discharged by the settlement or release with another, the released or discharged person or entity must be a tortfeasor, who is a joint tortfeasor together with the tortfeasor seeking to take advantage of the release settlement.

Simply stated, the plaintiffs assert "but for" the negligence of the defendants a case against the parties actually would have resulted in a verdict substantially more than the settlement. The plaintiffs also assert that the settlement is of no moment with respect to the claims negligently not filed by the defendants because the parties with whom settlement was made are not at fault under under the theories the defendants relied upon.

Statements contained in Defendants' Brief in Support of Preliminary Objections in the factual background portion relating to the inadequacy of the settlement are not complete. Plaintiffs do

complain of the inadequacy of the settlement but just as strongly complain of the defendants' failure to sue the Magee-Womens Hospital, employee-surgeon, and manufacturer-seller of Succinylcholine who did not participate in the settlement.

Res Judicata/Collateral Estoppel

Certain underlying principals govern the application of Res Judicata:

1. Identity of the subject matter is essential to the application of Res Judicata.

2. Identity of causes of action is an element in the application of Res Judicata.

3. When causes of action are distinct the doctrine of Res Judicata does not apply. Pa. Legal Encyclopedia, Sections 252, 253, 254.

The law in Pennsylvania on the application of collateral estoppel is set forth in Pilgrim Food Products Co. v. Filler Products, Inc., 393 Pa. 418,

143 A.2d 47 (1958) wherein the Supreme Court stated:

> " 'If the parties to an action have had an opportunity to appear and be heard in a prior proceeding involving the same subject matter, all issues of fact which were actually adjudicated in the former action and essential to the judgment therein are concluded as between the parties even though the causes of action in the two proceedings are not identical.' Larsen v. Larsen, 392 Pa. 609, 612, 141 A.2d 353, 355 (1958); Thal v. Krawitz, 365 Pa. 110, 112, 73 A.2d 376 (1950); In re Wallace's Estate, 316 Pa. 148, 153, 174 A. 397 (1934); Restatement, Judgments 68 (1942)."

Id. 393 Pa. 418 at 421-22, 143 A.2d at 49.

Defendants in their Brief in Support of Preliminary Objections assert that the doctrine of

issue preclusion prevents what they characterize as the relitigation of the adequacy of the $26,500.00 settlement. The defendants have attached to their brief a copy of Judge Wekselman's Order enforcing settlement and the Superior Court opinion affirming Judge Wekselman's Order. They have with bold conceit asked this Court to apply principals of issue preclusion to the instant case and thereby prevent plaintiffs from asserting legal malpractice of the defendants as a cause of action.

Judge Wekselman's Order enforcing settlement and the Superior Court Order affirming are limited to the issues of whether or not Mrs. Muhammad consented to the settlement. Not whether Mr. Messer and his law firm are liable to the plaintiffs for their negligence and fraud in their representation of the plaintiffs claims.

The Pennsylvania Commonwealth Court in Westinghouse Electric v. Board of Assessment Appeals, 456 A.2d 694, 72 Pa. 180 Cmwlth. 400 (1983) held that "application of this doctrine (Res Judicata) requires an identity in the claim sued

upon, an identity of the cause of action and an identity of the quality or capacity of the parties suing or sued" Id page 698.

The Court in Westinghouse quoting from Sharp v. Department of Transportation, 67 Pa. Cmwlth. Ct. 522, 447 A2d 1057 (1982) that "The essential inquiries whether the ultimate and controlling issues have been decided in a prior preceding in which the present parties have an opportunity to appeal and consent their rights."

Plaintiffs have not yet litigated the malpractice and fraud of defendant Messer and his law firm. The hearing before Judge Wekselman and the appeal to the Superior Court cannot be used by way of issue preclusion either under principles or res judicata or collateral estoppel to prevent them from bringing this cause of action. In short, plaintiffs have had no opportunity to present their cause of action for professional negligence and fraud against the defendants and have it decided by a jury. The Court should deny defendants' request for demur-

rer to Counts I, II, III, IV, V, VI and VIII of Plaintiffs' Complaint.

Professional Negligence

It is well established that there are three essential elements which must be established to bring a cause of action for professional negligence. "These are:

a. the employment of the attorney or other basis for duty;

b. the failure of the attorney to exercise ordinary skill and knowledge; and

c. that such negligence was the proximate cause of damage to the plaintiff." Schenkel v. Monheit, 405 A.2d 493 (Pa. Super. 1979).

Defendants in their Brief In Support Of Preliminary Objections state that the defendants failure to name, "the drug manufacturer, the surgeon, the previous hospital or unnamed others" did not add to plaintiffs' harm. Defendants cite several cases in support of this contention. In particular, they rely on Gans v. Mundy, 762 F2d 338, U.S.

Cert. 106 S.Ct. 537 (1985) and Schenkel v. Monheit, Supra.

The Gans case was a legal malpractice case brought against the plaintiff's second attorney. The complaint alleged that the attorney failed to include a defendant in the prior action and that the statute of limitations had passed as to this defendant. Plaintiff's complaint alleged a diminished and inadequate verdict as a result. The Gans Court held that there could be no cause of action against the attorney for failing to add the additional defendant where the statute of limitations had passed on any potential cause of action prior to the attorney defendant being retained as counsel. This is not the issue in the instant action.

The Schenkel Court was also faced with a legal malpractice case involving the failure of an attorney to join a putative defendant. In that case, the attorney failed to join a corporate defendant, allegedly liable on the basis of respondeat superior in a prior personal injury action involving an auto accident. The plaintiff in that case alleged that the

attorneys failure to sue the driver's corporate employer, in addition to the driver, caused an inadequate award of damages. The Schenkel Court held that "the actual tortfeasor, Salem, was made the defendant; the corporate employer could only arguably be liable under agency principles, not as an independent tort feasor." (emphasis added) Schenkel v. Monheit, 405 A.2d 494.

What Mr. Messer and his law firm fail to point out in their Brief is that neither of these cases stand for the proposition, that an attorney cannot be held accountable to his client if he fails to include as a defendant in an action entrusted to him potential defendants, who can be held liable under separate causes of action, and as independent tortfeasors liable for successive torts.

It is plaintiffs' position that defendant Messer and his law firm's failure to sue the hospital, employee surgeon and the drug manufacturers on distinct causes of action and as independent tort feasors is malpractice.

Actual Loss

In Count V the plaintiffs plead negligence based on the "but for" standard. Specific acts of negligence are set forth. It is asserted that "but for" the negligence of the defendants, suit would have been filed against, Magee-Womens Hospital, the employee-physician, and the manufacturer-seller of Succinylcholine. "But for" the negligence of the defendants recovery by jury verdict would be in favor of the plaintiffs. Also, "but for" the negligence and fraud of the defendants the plaintiffs would have recovered by jury verdict against the three parties actually sued.

In Gans v. Gray, 612 F.Supp. 608, District Judge Giles; held that the burden of demonstrating injury, i.e. actual harm, is the causation requirement in a legal malpractice case. "To prove actual injury, plaintiff must demonstrate that he would have prevailed in the underlying action in the absence of defendant's alleged negligence." Gans, 612 F.Supp. at 617. It is defendant's claim that the plaintiffs' damages are too speculative; however, a

measure of damages in a legal malpractice claim would be the amount which the plaintiffs would have received from a jury or through settlement. William v. Bashman, 457 F.Supp 322 (1978).

The fact that plaintiffs' damages are unliquidated, makes them more difficult to determine, but does not render them speculative. The courts have required expert testimony on this issue as well as the attorneys standard of care in legal malpractice actions. See Gans v Gray, Supra.

In Williams, the Court held, "Ordinarily the probability of settlement would be proved by expert testimony in the usual outcome of similar cases including such factors as the merit of the case, the size of the award that the plaintiff might have received, and whether the defendant in the underlying action would have been represented by counsel for an insurance company." Williams, 457 F.Supp 328. Plaintiffs', in their complaint, allege the requisite actual harm, i.e. that they would have prevailed in the underlying action against the Magee-Womens' Hospital, its employees/surgeon and the

drug manufacturer and that any award would be collectable. Also, but for the negligence and fraud of the defendants the plaintiffs would have prevailed in a jury trial against the parties actually sued.

Defendants are asking this Court to determine at the pleading stage of the proceedings before any evidence has been introduced as a matter of law that the plaintiffs have suffered no compensable injury. It is plaintiffs' position that this is an inappropriate time to award any proposed motion by defendants to strike the complaint.

Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress is defined in Section 46 of the Restatement of Torts Second as:

> "Outrageous conduct causing severe emotional distress (1) one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject

to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

(Comment d) to the Restatement of Torts Second, Section 46, provides further explanation:

"d. Extreme and outrageous conduct. The cases thus far decided are found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortuous or even criminal or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of

decency and to be regarded as atrocious and utterly intolerable in civilized community. Generally, the case in one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to explain, 'Outrageous!'."

The Third Circuit of Appeals on Chuy v Philadelphia Eagles Football Club, 431 F.Supp. 254 (Eastern District Pa 1977), has outlined four elements necessary to sustain a cause of action under Restatement of Tort Second Section 46:

1. The conduct must be extreme and outrageous;
2. The conduct must be intentional or reckless;
3. It must cause emotional distress;
4. The distress must be severe.

There is no requirement of physical injury impact for this tort. The plaintiffs have alleged more than sufficient amount of facts when recited

to an average member of the community would illicit the response of 'outrageous.' The overreaching and fraud perpetrated upon them by the defendants in supplying to them false opinions as to the value of their case being only $26,500.00 because they were 'poor and black' can only be characterized as extreme and outrageous.

Accepting as true plaintiffs' allegations, the Court must find that plaintiffs have alleged extreme and outrageous conduct on the part of the defendants. It is further asserted that the Court must find that plaintiffs have alleged extreme and outrageous conduct on the part of the defendants. It is further asserted that the Court must accept plaintiffs' allegation that these statements as to the value of their case were made for the sole purpose of protecting the defendants' interests and were made to the detriment of the plaintiffs. In any event, it is asserted that it is inappropriate to make a determination that the claim for intentional infliction of emotional distress cannot stand without having the opportunity to present all the facts in this case. It

should be for the trial judge to decide, after appropriate discovery, whether or not the count for intentional infliction of emotional distress can be an issue in this case.

Counts I, II, III of Plaintiffs' Complaint
Do State a Cause of Action in Deceit

Paragraphs 21 through 28 and 33 through 35 of the Second Amended Complaint plead with particularity and specificity fraudulent misrepresentations, concealment and nondisclosure.

The wife plaintiff, at the hearing before Judge Wekselman to enforce the settlement, was not represented by counsel. Defendant Messer at the hearing did not raise the issue of whether or not he had the informed consent of the plaintiffs to bind them to the settlement. Contrary to that proposition, he at all times maintained that he did have their consent.

Defendant further argues that any lack of consent by the defendant attorneys to bind the plaintiffs

to a settlement should have been raised during the appeal to the Superior Court.

Knowing that Mrs. Muhammad was not represented by independent counsel at the hearing before Judge Wekselman to enforce the settlement and that this issue could not have been brought upon the appeal to the Superior Court, defendant Messer and his law firm now seek to profit by their own fraud on the plaintiffs and assert that res judicata and collateral estoppel prevent them from bringing this action.

This Honorable Court should not countenance such a suggestion and should deny defendants' Motion to Strike Counts I, II, III of plaintiffs' Complaint.

Response to Defendants' Motion to Strike Count IV

Count IV of plaintiffs' Complaint sets forth a cause of action in negligence asserting that the defendants' conduct 'increased the risk' that plaintiffs would not recover from the Magee-Womens Hospital, its employee surgeon and the drug manu-

facturer. Defendants in their brief maintain that the law is 'well established' and that the only test that can be applied to a legal malpractice action is the "but for" test. They cite several Pennsylvania Superior Court decisions in support of this statement. However, the Pennsylvania Supreme Court has not yet spoken on this issue. The plaintiff in Gans, Supra, argued that Pennsylvania Law following the Restatement (Second) of Torts, Section 323 (a), and Hamil v. Bashline, 481 Pa 256, 392 A.2d 1280 (1978) allow a legal malpractice claims to show that the attorneys negligence increased the risk of harm to the plaintiff. The Federal District Court held that since any legal malpractice claim did not involve "physical injury", the relative causation analysis allowed in Hamil v Bashline for medical malpractice cases could not be employed in a legal malpractice case. Gans, 612 F.Supp. 614.

However, a Subcommittee which has promulgated the Proposed Jury Instructions on Professional Negligence, has determined that the Hamil v Bashline approach to proximate causation

should be used in a legal malpractice action. The subcommittee has rejected the "but for test" as too harsh and instead has employed the traditional substantial factor "language". The subcommittee writes: "Perhaps most significantly, legal cause is proved if the attorneys action or omission is shown to have destroyed the reasonable possibility of the client's success. Once the evidence sustains a reasonable possibility of recovery, whether ample or narrow, the defendant attorneys disregarded his duty and failure to conform to the applicable standard of care will compel the imposition of liability." Proposed Instruction Section 10.01 (E).

The Subcommittee in discussing the difference between the causation issue and the measure of damages issue writes that the current Superior Court opinions: "Would seem to require the plaintiff to prove by a preponderance of the evidence that he or she would have been successful in obtaining a verdict in judgment in the prior litigation. To give meaning to the dicta, the plaintiff would be required to prove the precise amount of a verdict

which would have been rendered by a jury in a former action and further and, further that, that the jury verdict would have been upheld on appeal. In position of such a stringent burden or proof has been rejected in many jurisdictions as an equitable and inconsistent with existing authority in posing malpractice liability upon other kinds of professionals for their negligent conduct."

Response to Defendants' Motion for More Specific Pleading/Count IV Breach of Contract

Defendants in their Third Set of Preliminary Objections complain that paragraphs 41 and 42 of Plaintiffs' Complaint which plead that plaintiffs have suffered pecuniary loss violates the applicable Rules of Civil Procedure in that it lacks specificity.

Paragraphs 39 and 40 are essential to a discussion of Paragraphs 41 and 42. Paragraphs 39 and 42 appear from plaintiffs' Second Amended Complaint appear as follows:

> 39. The agreement between the plaintiffs and defendants was in part written

and in part oral. A true and correct copy of the written portion, dated March 17, 1978, is attached hereto and designated, Exhibit "A". The oral portion was entered into at a later date, in the month of October, 1978.

40. The terms of the agreement between the plaintiff and the defendant are that:

a. The defendants would perform in their representation of the plaintiffs as attorneys skilled and experienced in medical malpractice litigation;

b. The defendant law firm and individual law firm member, defendant, would perform in their representation as attorneys who were specialists in medical malpractice litigation;

c. The defendants would pursue the plaintiffs' claim with due diligence;

d. The defendants would conduct a thorough and diligent search of the

underlying facts of the claim which included a search of all hospital records, a medical journal and medical text search or surgical procedure, anesthesia procedure, and medication given;

e. The defendants would seek expert information from scientists and medical doctors knowledgeable in the field of circumcision surgery, pediatric anesthesiology and pharmacology;

f. The defendant would inquire of the putative defendants before suit entered for an explanation of the cause of death of Nazir Muhammad;

g. The defendant would inquire of the defendant in any suit filed by court permitted discovery, timely made, of the cause of injury;

h. The defendants would give advice and opinion, only after a thorough research of the law and facts and

an intelligent decision reached therefrom;

i. The defendants would investigate all possible claims and causes of action on behalf of the plaintiffs and render opinions after reaching an intelligent decision as to what causes of actions existed and with respect to what causes and course of action should be pursued.

41. The defendants breached all of the promises, terms and conditions set forth in paragraph 40, above to the pecuniary loss of the plaintiffs, including attorneys fees and pre-judgment interest.

42. As a result of the breach of agreement by the defendants, the plaintiffs suffered pecuniary loss in an amount in excess of $20,000 plus the interest thereon from April 23, 1982.

Black's Legal Dictionary defines pecuniary loss as:

> "A loss of money, or of something by which money or something of money value may be acquired. As applied to a dependent's loss from death pecuniary loss means the reasonable expectation of pecuniary benefit from the continued life of the deceased: such includes loss of services, training, nurture, educations, guidance, and society. Sea Land Services, Inc. v Gaudet, 4114 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9."

The pecuniary loss that plaintiffs refer to in paragraphs 41 aned 42 of their Complaint is set forth in exquisite detail in paragraphs 14, 15 and 16 of their Complaint. In these paragraphs, plaintiffs plead that the pecuniary loss resulting from the defendants' negligence and fraud in the claims filed and in those that defendants failed to file against Magee-Womens Hospital, its employee-surgeon, and the

manufacturer-seller of Succinylcholine is a "loss of wages and earnings for the natural life expectancy of the decedent (an amount substantially in excess of $26,500), for monies expended for medical bills, funeral expenses, headstone and administration expenses; for pain and suffering and inconvenience on behalf of the decedent from the date of the defendants acts until his death, substantially in excess of $26,500, by jury trial or by settlement. Additionally, damages would have been recovered by Plaintiffs as parents for the loss of decedent's society, companionship, services, aid and comfort, assistance, wages and their pecuniary losses, either by jury trial or settlement, substantially, in excess of $26,500. Such damages were collectable from Magee-Womens Hospital or its employee-surgeon by reason of insurance and the Catastrophe Loss Fund.:

Count IV sets out the oral contract that plaintiffs entered into with the defendants. Without a reiteration of each allegation, plaintiffs placed their trust in the defendants and in their promise to use

their skill as lawyers experienced in medical malpractice cases to investigate and prosecute their claim arising from the death of their infant son Nazir.

Defendants should be estopped from suggesting to the Court that they did not promise to do any of these things that a lawyer must do on behalf of his or her client.

Defendants also suggest in the concluding paragraph of their brief that the defendants cannot be responsible for the alleged failure to sue an unidentified party. (i.e. the seller-manufacturer of the Succinylcholine). The Court should not permit the defendants who had a duty to investigate the identity of this putative tortfeasors some 7 years ago to now bring their identity into issue.

Respectfully submitted,

/s/ Kenneth W. Behrend
Attorney for Plaintiffs

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 218 Pittsburgh, 1987

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,

Appellants,

vs.

STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership, HOWARD MESSER and JAMES THOMAS, JR.,

Appellee.

BRIEF FOR APPELLANTS

Appeal from Order of Court entered January 13, 1987, in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. GD84-6520, Civil Division.

Kenneth W. Behrend
PA I.D. No. 00406

BEHREND, MORAN, ERNSBERGER and TAMILIA
2400 Grant Building
Pittsburgh, PA 15219

(412) 391-2515

Attorney for Appellants

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STATEMENT OF JURISDICTION

Jurisdiction over this appeal is conferred upon this Court under 42 Pa.C.S. section 742.

ORDER IN QUESTION

AND NOW, to wit, this 13th day of January, 1987, upon the preliminary objections filed by the defendants, it is hereby ORDERED, ADJUDGED and DECREED that said demurrer is sustained and judgment is entered in favor of the defendants.

It is further ORDERED that plaintiffs' petition for change of venue is denied.

BY THE COURT:

/S/ *Honorable Marion Finkelhor, J.*

STATEMENT OF QUESTIONS INVOLVED

I. DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANTS' ACTION IS BARRED BY A PRIOR OPINION OF THE SUPERIOR COURT?

II. DOES APPELLANTS' COMPLAINT SET FORTH A VALID CAUSE OF ACTION FOR LEGAL MALPRACTICE SUFFICIENT TO WITHSTAND A DEMURRER?

STATEMENT OF THE CASE

This is an appeal from the order sustaining a demurrer and entering judgment for appellees in a legal malpractice case which developed as follows.

On November 7, 1977, Nazir Muhammad was born to Pamela and Abdullah Muhammad at Magee Womens Hospital in Pittsburgh. In November of 1977, a surgeon on the staff of Magee Womens Hospital attempted to perform a circumcision on the infant boy, but failed to remove a sufficient amount of foreskin. As a result, the baby's penis had a redundant prepuce with phimosis, a condition which presented a health and hygiene hazard.

The parents took the infant to Children's Hospital for corrective surgery. On December 16, 1977, Doctor Stuart E. Price, Jr., a urologist, and Dr. Helen Westman, an anesthesiologist, members of the Children's Hospital staff, prepared for the operation. The drug succinylcholine was administered in preparation, followed by general anesthesia. Although complications developed, the doctors

elected to proceed with the operation rather than to force the infant to undergo a second anesthesia at a later date. The succinylcholine induced fatal pulmonary edema in the baby, and he died three days later from pulmonary insufficiency on December 19, 1977.

Three months later, Mr. and Mrs. Muhammad retained Attorney James Thomas, Jr., to represent them in a claim arising from the death of their baby son, Nazir Muhammad. Seven months later, in October, 1978, on the advice of Attorney Thomas, Mr. and Mrs. Muhammad retained Attorney Howard F. Messer and the partnership of Strassburger, McKenna, Messer, Shilobod and Gutnick to prosecute their claim.

Letters of administration for the estate of the infant were granted on October 28, 1978. In November, 1978, a complaint was filed with the Medical Arbitration Board against Children's Hospital of Pittsburgh, Stuart E. Price, Jr., M.D., and Helen Westman, M.D. A complaint was filed against the same defendants in the Court of

Common Pleas of Allegheny County on April 13, 1979. During a pretrial conciliation conference before the Honorable Martin J. Wekselman, the parties reached a settlement. The Muhammads, represented by Attorney Howard F. Messer, accepted the defendants' settlement offer of $26,500 for all claims arising from the death of their son.

Thereafter, the Muhammads became dissatisfied with the settlement. On April 5, 1982, upon petition of Children's Hospital, the trial court issued a Rule to Show Cause why the settlement should not be enforced. The trial court held a hearing on the Rule on April 23, 1982. Still represented at the hearing by Attorney Howard F. Messer, Mrs. Muhammad expressed her opinion that the amount of $26,500 was unfair and inadequate for the loss of a child. N.T., 4/23/82, at 3; R. R. 113a. She also testified that the settlement was negotiated by unjust means and that she was represented poorly by her own attorney. Id., at 3-4; R. R. 113-114a. The court then questioned her as to her authorization for her attorney to settle the case. She testified

that she told him to do "whatever you feel is best," and that she authorized him to "settle for $23,000 if we can't go any higher." Id. at 5; R. R. 115a. The court held that Mrs. Muhammad:

> did indeed authorize a settlement even at $23,000 if counsel felt that were the proper settlement. The only difficulty is that she has changed her mind since that time and now believes the settlement to be inadequate. Having authorized the settlement, she is not privileged to change her mind at this point. Had counsel not been authorized to enter into the settlement that, of course, would have been an entirely different matter . . . .

Id. at 7; R. R. 117a. Accordingly, the court ordered the enforcement of the settlement agreement and authorized appellees to pay the fund into court. To date, the Muhammads have not accepted that fund.

The Muhammads, then newly represented by undersigned counsel, appealed Judge Wekselman's decision to the Superior Court of Pennsylvania, at No. 601 Pittsburgh, 1982. On November 23, 1984, a panel composed of Judges Rowley, Johnson and

Popovich affirmed the order of the trial court. The memorandum opinion of this Court indicates that the affirmance was based on the holding that Mr. and Mrs. Muhammad authorized their attorney to settle their claim against Children's Hospital and Doctors Price and Westman.

Subsequent to taking the Superior Court appeal from the settlement of the medical malpractice case, the Muhammads brought an action alleging legal malpractice against the partnership of Strassburger, McKenna, Messer, Shilobod and Gutnick, and against Attorneys Messer and Thomas. Their complaint includes eight counts sounding in: fraudulent misrepresentation (deceit); fraudulent concealment (deceit); nondisclosure; breach of contract; negligence ("but for" standard); negligence ("substantiated facts" standard); outrageous conduct causing severe emotional distress; and breach of fiduciary obligation. The defendant attorneys filed preliminary objections in the nature of a demurrer to a second amended complaint filed by the Muhammads.

By order dated January 13, 1987, the Honorable Marion K. Finkelhor sustained the defendant attorneys' demurrer and entered judgment in their favor. Her opinion issued in conjunction with that order states that the issue upon which she granted the demurrer was "whether plaintiff's [sic] cause of action is barred by the prior opinion of the Superior Court in this matter."

This appeal timely followed.

SUMMARY OF ARGUMENT

The Muhammads' complaint against appellees essentially states a cause of action in legal malpractice. Judge Finkelhor sustained a demurrer by appellees and entered judgment in their favor. She did so apparently on the basis that the Muhammads had to show pecuniary damages in order to recover in such an action; that in order to do so they had to show that the settlement of the previous action was inadequate; and that they were estopped from making such a showing either by the doctrine of the law of the case or the doctrine of collateral estoppel.

The doctrine of the law of the case was not, however, applicable because appellees were not parties to the previous action in which the settlement was enforced.

The doctrine of collateral estoppel is applicable only if an issue is actually adjudicated in a previous action, if the party against whom the doctrine is involved had a full, fair and adequate opportunity to litigate the issue, and the adjudication of the issue

was essential to the disposition of the previous action. The comments of Judge Wekselman concerning the adequacy of the settlement did not reflect an adjudication of the issue, but were merely dicta. Likewise, this Court's remarks were not an affirmance of a factual finding by Judge Wekselman, but were also only dicta.

The Muhammads could not have had a fair opportunity to adjudicate the adequacy of the settlement negotiated by appellees when they were represented by appellees in the previous action. Although the Muhammads were represented by new counsel in the appeal to this Court of that action, they were bound by the record created by appellees.

Finally, Judge Wekselman was required to enforce the settlement once he had determined that the settlement was authorized by them whether or not that authorization was the result of malpractice by appellees which caused the settlement to be inadequate. Similarly, this Court had no choice but to affirm Judge Wekselman's order once it found sup-

port in the record for his finding that the settlement was authorized.

In reviewing a judgment entered on preliminary objections in the nature of a demurrer, all allegations in the complaint are deemed to be admitted, and any doubts must be resolved in favor of overruling the demurrer. To establish a cause of action for legal malpractice, three elements must be alleged: 1) employment of the attorneys; 2) failure of the attorneys to exercise ordinary skill and knowledge, and 3) actual pecuniary damage to the client caused by the attorneys' negligence. Appellants' complaint clearly alleges each of these elements; it was therefore erroneous to sustain a demurrer to the complaint.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANTS' ACTION IS BARRED BY A PRIOR OPINION OF THE SUPERIOR COURT

Although set forth in eight counts, the Muhammads' complaint against appellees generally pleads a cause of action for legal malpractice. To establish such a cause of action, a plaintiff must establish: 1) employment of the attorneys; 2) the attorneys' failure to exercise ordinary skill and judgment; and 3) pecuniary damages proximately caused by the attorneys' malpractice. Schenkel v. Monheit, 266 Pa. Super. 396, 405 A.2d 493 (1979). Appellees in their preliminary objections to the Muhammads' complaint, focused on the third element of damages stating that "[t]he settlement which had been entered into by the Plaintiffs [appellants] bars Plaintiffs' instant action and Plaintiffs are estopped from relitigating the settlement claiming additional damages for the same, i.e., the death of Nazir Muhammad." In their brief accompanying

their preliminary objections, appellees argued that seven of the eight counts of appellants' complaint were dependent on their allegations of the inadequacy of the settlement of the previous action against Children's Hospital, Dr. Stuart E. Price, and Dr. Helen Westman. They further argued that the adequacy of the settlement had already been litigated in the previous action and that, therefore, under either the doctrine of collateral estoppel or the doctrine of the law of the case, appellants' seven counts did not state causes of action.

After considering appellants' preliminary objections, Judge Finkelhor sustained a demurrer to all counts of appellants' complaint. In her opinion, she explained her decision as follows:

> Defendant has also raised preliminary objections in the nature of a demurrer to all counts of plaintiffs' complaint. The issue is whether plaintiff's cause of action is barred by the prior opinion of the Superior Court in this matter. See Muhammad v. Childrens Hospital, No. 601 Pittsburgh 1982 (Slip Opinion). Said demurrer is sustained and an appropriate Order is attached hereto.

(Trial Court Opinion, p. 6). Although Judge Finkelhor offered no analysis whatsoever of why appellants' "cause of action is barred by the prior opinion of the Superior Court," it would appear that she accepted appellees' argument concerning collateral estoppel or law of the case.[1]

Although Muhammads concede that seven counts of their complaint were dependent on their allegations of the settlement's inadequacy, they most vigorously content that neither of the two doctrines invoked by appellees was applicable in the instant case.

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[1] Curiously, Judge Finkelhor sustained a demurrer to all counts of appellants' complaint despite the fact that appellees' argument concerning collateral estoppel and law of the case by its own terms was relevant to only seven of the eight counts. The remaining count, which alleged a cause of action for emotional distress, was not dependent on whether the settlement of the previous action was inadequate. Thus, the emotional distress count would not fail to state a cause of action even if the adequacy of the settlement had already been litigated so as to estop appellants from relitigating the issue. Appellants submit that this Court, must, therefore, conclude that Judge Finkelhor erred at the very least in sustaining a demurrer to appellants' emotional distress count.

LAW OF THE CASE

Appellants will first discuss the doctrine of the law of the case since it is so obviously inapplicable to this case and thus can be quickly and easily considered and disposed of by the Court. This doctrine is a general rule of law that provides that issues decided by an appellate court on a prior appeal between the same parties will not be reconsidered on a second appeal. Commonwealth v. Tick, Inc., 431 Pa. 420, 246 A.2d 424 (1968); Daniels v. State Farm Mut. Auto. Ins. Co., 305 Pa.Super. 352, 451 A.2d 684 (1982). In other words, the law of the case doctrine requires that a second appeal involve the same case as a previous appeal, which requirement cannot be satisfied unless the parties to both appeals are the same.

Clearly, the parties to this appeal are not the same parties as were involved in the previous appeal that Judge Finkelhor held barred the instant action. Although the Muhammads were parties in both appeals, appellees were not parties in the previous appeal. This is thus not the same "case" that

was involved in the previous appeal. Therefore, even if the issue of the adequacy of the settlement has been decided in the previous appeal (a fact which appellants do not concede), the doctrine of the law of the case could not possibly preclude appellants from litigating that issue in the instant action.[2]

COLLATERAL ESTOPPEL

The only doctrine which even arguably could preclude appellants from litigating the adequacy of the settlement is the doctrine of collateral estoppel.[3]

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2 In any event, appellees' argument to Judge Finkelhor that she should sustain their demurrer under the doctrine of the law of the case was a non sequitur since that doctrine applies only to appellate courts. Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1966).

3 Appellees in their trial brief used the terms res judicata and collateral estoppel interchangeably in support of their argument that appellants were precluded from litigating the adequacy of the settlement. Those terms, however, represent very distinct doctrines. Unlike collateral estoppel, and like law of the case, res judicata requires the identity of the parties to the action. In re Jones v. Laughlin Steel Corp., 328 Pa.Super. 442, 477 A.2d 527 (1984). Since the parties to the instant action are not identical to the parties in the previous action, the doctrine of res judicata has no applicability to this case.

Collateral estoppel is a doctrine of issue preclusion. Lebeau v. Lebeau, 258 Pa.Super. 519, 393 A.2d 480 (1978). It essentially precludes a party in an action from relitigating an issue which that party litigated in a previous action. In order for the doctrine to be applicable, however, three conditions must be satisfied. First, the issue in question must have been actually adjudicated in the former action. Oak Lane Shopping Center, Inc. v. Flame, 264 Pa.Super. 9, 398 A.2d 721 (1978). Second, the party against whom the doctrine is invoked must have had a full, fair and adequate opportunity to litigate the issue. Long v. Long, 306 Pa.Super. 142, 452 A.2d 255 (1982). Third, the adjudication of the issue had to have been essential to the disposition of the former action. Id. The Muhammads submit that none of these conditions was met in regard to the issue of the adequacy of the settlement.

Appellants first content that adequacy of the settlement was adjudicated neither by Judge Wekselman in the previous action nor by this Court

in the appeal of that action. In their successful effort to persuade Judge Finkelhor otherwise, appellees in their trial brief quoted out of context the following portions of Judge Wekselman's opinion and the Superior Court panel's memorandum:

> [I]n the view of the Court, settlement was indeed an advantageous one--given the apparently difficult liability and damages questions in the case.
>
> Settlement having been authorized and it being a proper settlement, the court made the rule absolute and authorized the Defendants to pay the fund in the Court.

Muhammad v. Children's Hospital of Pittsburgh, GD81-02864, Court of Common Pleas of Allegheny County, Slip Opinion, p. 1., R. R. 107a.

> Moreover, we agree with Judge Wekselman's assessment that the settlement was beneficial to Appellants' interests since, at trial, they would have had great difficulty in establishing that any of the Appellees behaved negligently.

Muhammad v. Children's Hospital of Pittsburgh, No. 601 Pittsburgh 1982, Slip Opinion, p. 7., R. R. 125a.

Appellants concede that, out of context, the foregoing quotations make it appear that both courts adjudicated the adequacy of the settlement. In context, however, it is apparent that the above excerpts were merely gratuitous comments or observations by the courts.

An examination of the transcript of the proceeding before Judge Wekselman quite clearly reveals that no issue of the adequacy of the settlement was before him and that no testimony was adduced by either party on that issue except for a statement by Mrs. Muhammad that she believed the amount of the settlement was unfair. The only factual issue presented to and resolved by Judge Wekselman was whether Mrs. Muhammad had authorized the settlement. This conclusion is evident from the following statements made by Judge Wekselman at the hearing:

> THE COURT: Very well. It's the Court's conclusion from the testimony and from the in chambers discussion in which Mr. Messer indicated that he was of the belief that he was authorized to enter into the settlement that has been corroborated by Mrs. Muhammad who indicates that she did indeed authorize settlement even at $23,000 if counsel felt that were the proper settlement. The only difficulty is that she has changed her mind since that time and now believes the settlement to be inadequate. Having authorized the settlement, she is not privileged to change her mind at this point. Had counsel not been authorized to enter into the settlement that, of course, would have been an entirely different matter, but the proper authority having been granted we simply cannot permit these cases to bounce around back and forth. It is the Court's view, as it was then, that the settlement agreement is a proper, just and equitable settlement in the circumstances, or the Court would not have suggested it.

N.T. 4/23/82, at 7-8; R. R. 117-118a. It is thus apparent that Judge Wekselman resolved the factual issue of whether the settlement had been authorized and then simply made a fleeting reference to his

personal opinion that the amount of the settlement was adequate.[4]

Since Judge Wekselman made no factual finding as to the adequacy of the settlement, this Court could not of course have affirmed such a finding in the prior appeal. Rather, this Court's comments were essentially of the same nature as those of Judge Wekselman. An examination of appellants' brief in the previous appeal will demonstrate that no issue was presented to the Court regarding the settlement's adequacy. The panel's comments were made at the end of its discussion of the last issue raised by appellants. That issue dealt with whether Mrs. Muhammad had given her express consent to the settlement of appellants' claim. After concluding that "there is no reason for this Court to disturb the trial court's factual finding that Mr. Messer had the appellants' express consent to settle the claim

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4 Judge Wekselman's opinion that the amount of the settlement was adequate is most understandable in light of his statement that he had suggested that the case be settled for that amount.

filed against the appellee," the panel added the surplusage that it also agreed with Judge Wekselman's "assessment" of the adequacy of the settlement.

Thus, the Muhammads submit that there can be no question that the above-quoted excerpts do not represent the resolution of a factual issue by Judge Wekselman or an affirmance of a factual finding by this Court. Appellants therefore contend that there has never been an adjudication of the adequacy of the settlement such that collateral estoppel would preclude the litigation of that issue in the instant action.

Even if it is assumed that the issue of the settlement's adequacy was actually litigated in the previous action, the Muhammads did not have a full, fair and adequate opportunity to conduct that litigation. At the proceeding before Judge Wekselman, appellants were still represented by appellees. For appellees to have contended in their trial brief that such a proceeding constituted a full, fair and adequate opportunity for the Muhammads to show that appellees had negotiated an inadequate settlement

was, to say the least, disingenuous and ludicrous. If the Muhammads had been represented by different counsel, Judge Wekselman presumably would have been informed, as he was not, that other parties whose liabilities were clear and who could have contributed to a settlement had not been sued. Furthermore, while the Muhammads were represented by new counsel in the appeal from Judge Wekselman's order, they had to rely in that appeal on the record created by appellees in the trial court proceeding. Appellants therefore respectfully contend that the only conclusion this Court can reach that would comport with the reality of the previous proceedings is that the Muhammads have never had a full, fair and adequate opportunity to litigate the adequacy of the settlement negotiated by appellees. Thus, again, collateral estoppel would not preclude the Muhammads from litigating the adequacy of the settlement in this action.

Finally, even if this Court were to conclude that the Muhammads had in the previous action a full opportunity to litigate the issue of the adequacy of

the settlement and that that issue was actually adjudicated, the doctrine of collateral estoppel would still not be applicable. It would not be applicable because an adjudication of the adequacy of the settlement was not essential to the disposition of the former action.

The purpose of the former proceeding was to dispose of Children's Hospital's Rule to Show Cause why the settlement it had agreed upon with appellees should not be enforced. In Pennsylvania, an attorney cannot settle his client's litigation without express authorization from the client. Rothman v. Fillette, 503 Pa. 259, 469 A.2d 543 (1983). Thus, the question to be answered in the proceeding before Judge Wekselman was whether or not appellees had been authorized to enter into the settlement agreement. Judge Wekselman resolved that question in favor of Children's Hospital and appellants readily concede that collateral estoppel would preclude them from relitigating the question of authorization in this action.

In the instant action, however, the Muhammads seek to prove that their authorization for the settlement resulted from the legal malpractice of appellees and in order to recover on that cause of action they must show that the settlement they authorized was inadequate. Neither issue was relevant in the outcome of the proceeding before Judge Wekselman. This conclusion results from the following general principles of agency:

> An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.
>
> . . .
>
> As in the case of any other agreement, one or both of the parties may have entered into it by mistake resulting from fraud or otherwise. When this is true, the agreement may be voidable by the one mistaken. See the Restatement of Contracts, Section 502. However, until the agreement is rescinded, the relation continues and acts done in pursuance of it are effective as to third persons.

Restatement (Second) of Agency, Section 15 and Comment thereto.

Here, the agreement was the Muhammads' authorization to appellees to settle, and the act done in pursuance of that agreement was appellees' settlement with the "third person" of Children's Hospital. Thus, the settlement was effective as to Children's Hospital even if appellees were given authority by a mistake resulting from their malpractice. Therefore, whether or not appellees' malpractice caused the Muhammads to authorize an inadequate settlement, once Judge Wekselman had determined that the Muhammads had in fact authorized the settlement, he had no choice but to enforce it as to Children's Hospital. Since the settlement had to be enforced as to Children's Hospital whether or not the amount of the settlement was inadequate, it could not have been essential for Judge Wekselman to adjudicate the issue of the settlement's adequacy in order to dispose of Children's

Hospital's Rule to Show Cause why the settlement should not be enforced.[5]

An identical analysis applies to the previous appeal before this Court. Since that appeal concerned only Judge Wekselman's order to enforce the settlement as to Children's Hospital and the adequacy of the settlement was irrelevant to the propriety of that order, it was not essential for this Court to adjudicate that issue in the former appeal.

As the foregoing analysis demonstrates, the issue of the adequacy of the settlement was not essential to the disposition of the former action. Therefore, collateral estoppel would not preclude the Muhammads from litigating that issue in the instant action.

Since neither the doctrine of the law of the case nor the doctrine of collateral estoppel would pre-

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5 It is true that this Court has held that a settlement agreement may be attacked on the basis of fraud. See Greentree Cinemas Inc., v. Hakim, 289 Pa.Super. 39, 432 A.2d 1039 (1981). However, fraud in this context refers to fraud by the party seeking to enforce the agreement, not, as in the instant case, to fraud by an agent of the party against whom the enforcement of the agreement is sought.

clude the Muhammads from litigating the adequacy of the settlement negotiated by appellees, appellants respectfully submit that Judge Finkelhor erred in holding that the instant action is barred by the decision in appellants' previous action and, on that basis, sustaining appellees' demurrer. Accordingly, the Muhammads urge this Court to correct that error by vacating the order entering judgment entered in favor of appellees and remanding this case for appellants' action to proceed.

II. APPELLANTS' COMPLAINT SETS FORTH A VALID CAUSE OF ACTION FOR LEGAL MALPRACTICE SUFFICIENT TO WITHSTAND A DEMURRER.

It is submitted that the preceding section establishes that judgment for the attorney-appellees cannot be justified on grounds of "the prior opinion of the Superior Court in this matter," as it was granted by Judge Finkelhor. This Court, however, might deem it appropriate to affirm the judgment if it would have been proper for any other reason asserted in appellees' preliminary objections to the complaint. This section of the brief therefore addresses the sufficiency of the allegations in the complaint to state a cause of action upon which relief can be granted. The complaint clearly states a cause of action for legal malpractice based on a number of different theories of liability.

In assessing whether a complaint states a cause of action sufficient to withstand a demurrer, the court must apply the following standard:

> A preliminary objection in the nature of a demurrer is not to be sus-

> tained and the complaint dismissed unless the law says with certainty that no recovery is possible. Hoffman v. Misericordia Hosp. of Phila., 439 Pa. 510, 267 A.2d 867 (1970). Therefore, if any theory of law will support the claim raised by the [complaint], a dismissal is improper. . . .
>
> For the purpose of our review of a dismissal on the pleadings in the nature of a demurrer, the averments of [the complaint], except to the extent that they constitute conclusions of law, must be taken as true, Freezer Storage, Inc. v. Armstrong Cash Co., 476 Pa. 270, 382 A.2d 715 (1978).

Cianfrani v. Commonwealth, State Employees' Retirement Bd., 505 Pa. 294, 297, 479 A.2d 468, 469 (1984). This Court has recently stated the test in the following language:

> A preliminary objection in the nature of a demurrer "admits all relevant facts sufficiently pleaded in the complaint, and all inferences fairly deducible therefrom, but not conclusions of law or unjustified inferences." Preliminary objections can properly be sustained and a complaint dismissed only in cases that are clear and free from doubt. Any doubt must be resolved against the moving party.

> Only where it appears with certainty that, upon the facts averred, the law will not permit recovery can the complaint be dismissed and summary judgment entered for the defendant.

Aetna Electroplating Co., Inc. v. Jenkins, 335 Pa.Super. 283, 285, 484 A.2d 134, 135 (1984) (citations omitted). Furthermore, any doubt should be resolved in favor of overruling the demurrer, Chorba v. Davlisa Enterprises, Inc., 303 Pa. Super. 497, 450 A.2d 36 (1982).

With this standard of review in mind, the question is whether the complaint sets forth a claim upon which relief can be granted.

This court has recently restated the elements of a cause of action for legal malpractice:

> There are three essential elements which must be established in order to bring an action for malpractice against an attorney: (1) the employment of the attorney or other basis for his obligation to act as attorney; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) negligence of the attorney which was the proximate cause of damage to the plaintiff.

ei bon ee baya ghananee v. Black, 350 Pa. Super. 134, 140, 504 A.2d 281 284 (1986), citing Schenkel v. Monheit, 266, Pa. Super. 396, 405 A.2d 493 (1979).

The first element, employment of appellees, is alleged in paragraphs 3-5, 9, 10 of the complaint, R. R. 55-57a, and is a matter not in dispute.

The second element is that appellees failed to exercise ordinary skill and knowledge. It is alleged that they failed to prosecute the claim arising from the death of appellants' infant son, Nazir Muhammad, with ordinary skill and competence. The complaint alleges the following events.

Within weeks of Nazir Muhammad's birth, a surgeon employed by Magee Womens Hospital negligently performed an incomplete circumcision on the infant. Complaint, paragraphs 6, 7; R. R. at 56A. Subsequent corrective surgery at Children's Hospital of Pittsburgh included preoperative administration of the drug succinylcholine and general anesthesia. Id., paragraph 8; R. R. at 56a. The drug induced pulmonary edema, causing the death

of the infant. Id. The succinylcholine was administered to the baby in the same condition as manufactured and sold, it was used for the purpose intended, and it was dangerously defective yet it contained no warning of the defect. Id., paragraph 16, R. R. at 59-60a.

These allegations immediately raise questions as to the possible liability of numerous individuals and agencies for the harm which befell the infant. First, the surgeon who performed the initial circumcision incompetently might be held liable for the suffering involved in undergoing corrective surgery, regardless of the outcome of the second operation. Pratt v. Stein, 298 Pa.Super. 92, 444 A.2d 674 (1982). More significantly, of course, the first surgeon might be held partially responsible for the death of the infant by negligently performing the circumcision in such a fashion that a second operation was required. Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978). Magee Womens Hospital might be partially responsible for the death by employing the incompetent surgeon. Simmons

v. St. Clair Memorial Hospital, 332 Pa. Super. 444, 481 A.2d 870 (1984). The manufacturer of the drug succinylcholine might be responsible under a theory of strict product liability. Restatement (Second) of Torts section 402A; Azzarello v. Black Bros. Co., Inc., 480 Pa. 547, 391 A.2d 1020 (1978); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). The drug manufacturer might be responsible for negligence in failing to warn of the dangerous propensities of the drug. Restatement (Second) of Torts section 388; Baldino v. Castagna, 505 Pa. 239, 478 A.2d 897 (1984). Children's Hospital of Pittsburgh might be responsible for the baby's death under a theory of strict product liability for the drug succinylcholine. Restatement (Second) of Torts section 402A; Baldino v. Castagna, supra. Children's Hospital, Doctor Price and Doctor Westman might be responsible for failing to obtain appellants' informed consent to the surgery. Boyer v. Smith, 345 Pa.Super. 66, 497 A.2d 646 (1985); Rogers v. Lu, 335 Pa.Super 595, 485 A.2d 54 (1984); Gallegor by Gallegor v.

Felder, 329 Pa.Super. 204, 478 A.2d 34 (1984). These possibilities suggest a duty on the part of reasonably competent attorneys, prosecuting a claim on behalf of the deceased infant, to investigate and pursue all of these potential causes of action.

The complaint alleges as much. The complaint alleges that appellee-attorneys committed legal malpractice in failing to pursue the above causes of action, based on a variety of theories.

The complaint alleges that appellees fraudulently and intentionally misrepresented material facts to appellants. Specifically, it is claimed that they represented that they had done all things required as appellants' attorneys, when, in fact, they had carelessly and negligently failed to pursue claims against all parties potentially liable under all theories of liability; that they urged a settlement on appellants with evil motive, telling them a jury would not award more than $26,500 because they were poor and black; and that appellees falsely informed appellants they were pursuing a claim based on lack of informed consent when, in fact,

they neglected to do so. Id, paragraphs 20-31, R. R. at 61-65a.

It is alleged that appellees did not inform appellants of the consequences of assent to the settlement offer, specifically, that communication of assent to the Court would be final and binding on appellants. Id., paragraphs 34-36, R. R. at 65-66a. It is also alleged that the foregoing derelictions, as well as appellees' failure to perform adequate research, investigation, and discovery, and to obtain expert medical evidence, constituted a breach of their contract to represent appellants. Id., paragraphs 38-43, R. R. at 67-69a.

The complaint alleges that appellees' failure to sue responsible parties, to pursue the claim of lack of informed consent, to investigate, to perform discovery, to advise appellants and to seek expert medical assistance, constituted negligence. Id., paragraphs 44-56, R. R. at 69-72a.

It is further alleged in the complaint that appellees' performance of their duties in representing appellants was so far below ordinary profes-

sional standards as to be outrageous, causing severe emotional distress, and was a breach of their fiduciary obligations to appellants. Id., paragraphs 57-66, R. R. at 73-76a.

Thus, it is clear that the complaint sets forth, in detail, allegations that the appellee-attorneys failed to exercise ordinary skill and knowledge while representing appellants, and the complaint clearly satisfies the second element of the test in ei bon ee baya ghanee v. Black, supra.

The final element of a cause of action in legal malpractice is that the attorneys' negligence be the proximate cause of actual pecuniary loss to the clients. Id. This element is set forth in the complaint in paragraphs 14, 15, 16, 29, and 54, R. R. at 57-60a, 64-65a, 72a. It is submitted that, when ruling upon a demurrer, these allegations suffice to preclude entry of judgment. Chorba v. Davlisa Enterprises, Inc., supra.

The requirement that actual damages be alleged is explained in Mariscotti v. Tinari, 335 Pa. Super. 599, 602, 485 A.2d 56, 57 (1984) and Pashak v.

Barish, 303 Pa. Super. 559, 561-62, 450 A.2d 67, 69 (1982). Legal Malpractice, if it causes only nominal damages, speculative damages, or the threat of future harm, is not actionable. "The test of whether damages are remote or speculative has nothing to do with the difficulty in calculating the amount, but deals with the more basic question of whether there are identifiable damages . . . .

Thus, damages are speculative only if the uncertainty concerns the fact of damages rather than the amount." Mariscotti v. Tinari, supra, at 602, 485 A.2d at 57 (emphasis added). Appellants therefore recognize that the fact of damages will be a necessary item of proof at trial, but at the present stage of the pleadings in the trial court, a ruling on preliminary objections, appellants could have done no more than plead that appellees' malpractice caused actual pecuniary loss, as they did. A demurrer, which admits all allegations in the complaint, cannot be granted in favor of defendants who are deemed to admit that their pro-

fessional malpractice caused pecuniary damage to the plaintiffs as the complaint alleges in paragraphs 14, 15, 16, 29, 43 and 59, R. R. at 57-60a, 64-65a, 68-69a, 72a.

Under the test stated in Mariscotti and Pashak, supra, it is submitted that appellants' damages are not speculative. Appellees argue that appellants accepted a settlement of $26,500 for the single harm they suffered, the wrongful death of their infant son, and that the Superior Court expressed, in dictum, that "the settlement was beneficial to the appellants' interests. . . ." This argument cannot withstand scrutiny.

There is a world of difference between the concepts of an adequate settlement and a fair verdict. Settlement negotiations necessarily take into account the identity and number of defendants, the nature of the claims against the defendant, and the difficulty of proving liability on each claim. These factors, indeed were recognized by the prior panel of this Court in

Muhammad v. Children's Hospital, when it stated: "Moreover, we agree with Judge Wekselman's assessment that the settlement was beneficial to the appellants' interests since, at trial, they would have had great difficulty in establishing that any of the appellees behaved negligently." Id., Memorandum opinion at 7, R. R. 125a (emphasis added). The Court, of course, was assessing the case which existed, not the case which should have been brought. The Court recognized the difficulty of establishing the negligence of Children's Hospital, Doctor Price and Doctor Westman. The Court did not address the hypothetical quality of the settlement if the case had included strict product liability claims against the drug manufacturer and Children's Hospital, negligence claims against the first surgeon and Magee Womens Hospital, and proper reports supporting a claim of lack of informed consent, which would have been the case but for the professional malpractice of appellee-attorneys. The quality of the

settlement would have appeared in a vastly different light if appellees had properly prosecuted appellants' claim arising from the death of their son.

It is submitted that appellants' complaint properly sets forth a cause of action in legal malpractice upon which relief can be granted, and that the trial court erred in sustaining appellees' preliminary objections in the nature of a demurrer.

CONCLUSION

For all of the reasons stated herein, appellants respectfully urge this Honorable Court to vacate the order entering judgment, and to remand this case for appellants' action or proceed.

BEHREND, MORAN, ERNSBERGER,
& TAMILIA
Attorneys for Appellants,

By */s/ Kenneth W. Behrend*

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,	CIVIL DIVISION
Plaintiffs,	NO. GD 84-6520
v.	OPINION AND ORDER OF COURT SUSTAINING DEFENDANTS' PRELIMINARY OBJECTIONS AND DENYING CHANGE OF VENUE
STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership, HOWARD MESSER and JAMES THOMAS, JR.	January 13, 1987
Defendants.	FINKELHOR, J.

Copies sent to:

Kenneth W. Behrend, Esq.
James R. Schadel, Esq.
James Thomas, Esq.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD, Plaintiffs, v. STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership, HOWARD MESSER and JAMES THOMAS, JR. Defendants.	NO. GD 84-6520

OPINION

FINKELHOR, J.

This matter is before the court on the third preliminary objections of defendants to plaintiffs' complaint and on plaintiff's petition for change of venue in a legal malpractice action.

Background

Plaintiffs are the parents of Nazir Muhammad, who was born on November 7, 1977 and died shortly thereafter.

In November of 1977, an incomplete circumcision was performed on Nazir Muhammad at Magee-Womens Hospital. On December 16, 1977, Nazir Muhammad was operated upon again to complete removal of his foreskin. As a consequence of the preparation for general anesthesia, he suffered pulmonary edema and died three days later in the Children's Hospital at Pittsburgh, Pennsylvania.

In March, 1978, plaintiffs employed defendant James Thomas, Jr., to represent them. In October of the same year, plaintiffs retained and employed the defendant law firm and the individual member of that firm to prosecute plaintiffs' claim.

On November 18, 1978, defendants filed a notice of Complaint with the Medical Arbitration Board against Children's Hospital, and Stewart E. Price, Jr. (the urologist performing the second circumcision) and Helen Westman (the anesthesiologist

attending the decedent). In April of 1979, an action was filed against the same defendants in the Court of Common Pleas of Allegheny County.

Due to defendants' representation and advice to plaintiffs, plaintiffs agreed as a result of a pretrial conciliation before Judge Wekselman, to accept a settlement offer in the amount of $26,500.00.

Plaintiffs thereafter became dissatisfied with the settlement to which they had agreed and attempted to have the Court prevent enforcement of the settlement. The original complaint states that the Court by Order entered the 23rd day of April, 1982 confirmed the settlement and that the Superior Court of Pennsylvania denied the appeal filed by plaintiffs relating to the settlement on November 23, 1984.

Plaintiffs filed the action presently before the Court by praecipe on April 19, 1984. The complaint in this matter was filed on or about April 2, 1986.*

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* Plaintiffs' complaint in the present matter consists of eight counts:

Defendants seek a demurrer to all counts of plaintiff's complaint. Additionally, plaintiffs seek a change of venue.

Position of the Parties

Plaintiffs seek a shift of venue in this matter from Allegheny County. Plaintiffs contend that, due to the special relationship that the judges of Allegheny County have with their fellow jurist Judge Eugene B. Strassburger III, no judge can sit on this case without an appearance of bias.

Defendants contend that plaintiffs' request is in effect, a request that the court peremptorily recuse all 43 members of this court. Defendants also seek a demurrer to all counts of plaintiffs' complaint, contending that plaintiffs have failed to establish a cause of action in this matter.

I. Fraudulent Misrepresentation (Deceit)
II. Fraudulent Concealment (Deceit)
III. Nondisclosure
IV. Breach of Contract
V. Negligence - But For Standard
VI. Negligence - Substantiated Facts Standard
VII. Outrageous Conduct Causing Severe Emotional Distress
VIII. Breach of Fiduciary Obligation

Discussion

1. Change of Venue

Plaintiffs have filed the instant action in the Court of Common Pleas of Allegheny County. They have voluntarily submitted themselves to Allegheny County jurisdiction. In the absence of gross impropriety, plaintiffs have waived all objections to venue.

As stated in the case of Alan Wood Steel Company v. School District of Philadelphia, 425 Pa. 455, 229 A.2d 881 (1967):

> "Moreover, the taxpayer voluntarily submitted itself to the jurisdiction of Philadelphia County. By the institution of its action the taxpayer waived the issue of venue." 229 A.2d at 885

In addition to the fact that plaintiff, by submitting itself to venue in the Courts of Allegheny County, has waived the issue of venue, it is also apparent to the court that plaintiff is, in effect ask-

ing for this court to grant a general recusal for all the judges in Allegheny County.

In Reilly by Reilly v. Southeastern Pa. Transp. Auth., 507 Pa. 204, 489 A.2d 1291 (1985), the Supreme Court of Pennsylvania recently set forth the procedure by which a motion to disqualify a judge is to be resolved. In Reilly, the Pennsylvania Supreme Court stated that Canon 3C of the Code of Judicial Conduct:

> ". . . does not have the force of substantive law, but imposes standards of conduct upon the judiciary to be referred to by a judge in his self-assessment of whether he should volunteer to recuse from a matter pending before him. The rules do not give standing to others, including Superior Court, to seek compliance or enforcement of the Code because its provisions merely set a norm of conduct for all our judges and do not impose substantive legal duties on them.
>
> Similarly, we have held that the Code of Professional Conduct, applicable to the conduct of attorneys does not have the force of substantive law." 489 A.2d at 1298. (Emphasis in the original.)

Plaintiffs' reliance upon Canon 3C as substantive law in their attempt to recuse all the judges of the Court of Common Pleas of Allegheny County is misplaced. Therefore, plaintiffs' request for change of venue (which is, in effect, a request for recusal), is substantively improper.

In Reilly, supra., the Supreme Court also stated:

> ". . . it is still the duty of the party, who asserts that a judge should be disqualified, to allege by Petition, the bias, prejudice or unfairness necessitating recusal. Commonwealth v. Darush, Id.; Commonwealth v. Perry, Id. A failure to produce a sufficient plea will result in a denial of the recusal motion." 489 A.2d at 1299.

Plaintiffs allege that members of the defendant law firm share social, familial and economic relationships with all of the members of the bench in the Court of Common Pleas of Allegheny County. When a charge of disqualification is made against a Judge, the party must produce specific allegations supported by evidence which has a tendency to show bias, prejudice or unfairness. In the present

matter, plaintiffs have failed to allege any facts which would support a petition for change of venue based on the recusal of all of the judges in Allegheny County.

Plaintiffs' petition for change of venue on the basis of recusal is also improper procedurally. In Reilly, supra., the Court stated:

> "The proper practice on a plea of prejudice is to address an application by petition to the judge before whom the proceedings are being tried. He may determine the question in the first instance, and ordinarily his disposition of it will not be disturbed unless there is an abuse of discretion." 489 A.2d 1299.

According to this case, Plaintiffs' petition for change of venue is premature. This case has not yet been assigned to a trial judge and it is improper for the Court at this time to grant a "blanket" recusal of all judges in Allegheny County by shifting the venue in this action to a different county. Therefore, plaintiffs' petition for change of venue is denied in the present matter.

2. Preliminary Objections

Defendant has also raised preliminary objections in the nature of a demurrer to all counts of plaintiffs' complaint. The issue is whether plaintiff's cause of action is barred by the ***prior*** opinion of the Superior Court in this matter. See Muhammad v. Children's Hospital, No. 601 Pittsburgh 1982 (Slip Opinion). Said demurrer is sustained and an appropriate Order is attached hereto.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD, Plaintiffs, v. STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership, HOWARD MESSER and JAMES THOMAS, JR. Defendants.	NO. GD 84-6520

ORDER OF COURT

AND NOW, to wit, this 13th day of January, 1987, upon the preliminary objections filed by the defendants, it is hereby ORDERED, ADJUDGED and DECREED that said demurrer is sustained and judgment entered in favor of the defendants.

It is further ORDERED that plaintiffs' petition for change of venue is denied.

BY THE COURT

/s/ FINKELHOR, J.

PROOF OF SERVICE

I hereby certify that two (2) copies of the Brief For Appellants and Reproduced Record were hand delivered this 30th day of March, 1987, as per Pa. R.A.P. 121, to the following:

James R. Schadel, Esquire
1201 Grant Building
Pittsburgh, PA 15219

S. James Goldman, Esquire
1315 Grant Building
Pittsburgh, PA 15219

BEHREND, MORAN,
ERNSBERGER & TAMILIA
Attorneys for Appellants,

BY /s/ *Kenneth W. Behrend*

IN THE SUPREME COURT OF PENNSYLVANIA

No. 5 W.D. Appeal Docket, 1989

PAMELA MUHAMMAD, Administratrix of the
Estate of NAZIR MUHAMMAD and
ABDULLAH MUHAMMAD,

vs.

STRASSBURGER, McKENNA, MESSER, SHILOBOD
and GUTNICK, a law partnership;
HOWARD MESSER and JAMES THOMAS, JR.

Appeal of
STRASSBURGER, McKENNA, MESSER, SHILOBOD
and GUTNICK, a law partnership;
and HOWARD MESSER

BRIEF FOR APPELLEES

Appeal of the Order, entered May 13, 1988
by the Superior Court of Pennsylvania, at No. 218
(Reargument Denied July 8, 1988) Pgh. 1987, reversing
the Order, entered January 13, 1987, by the Court
of Common Pleas of Allegheny County, Pennsylvania
Civil Division at No. G.D. 84-6520

Kenneth W. Behrend
PA I.D. No. 00406

BEHREND and ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

ATTORNEY FOR APPELLEES PAMELA
MUHAMMAD, ADMINISTRATRIX OF
THE ESTATE OF NAZIR MUHAMMAD
AND ABDULLAH MUHAMMAD

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STATEMENT OF JURISDICTION

Jurisdiction over this appeal is granted pursuant to 42 Pa.C.S.A., section 724(a); in conjunction with 42 Pa.C.S.A., section 5105(d)(1). The Supreme Court granted the allowance of this appeal by their order dated January 9, 1989.

ORDER IN QUESTION

The Order in question reads as follows:

AND NOW, this 13th day of May, 1988, it is ordered as follows:

X	Order reversed. Case remanded for proceedings consistent with this Opinion, Jurisdiction is relinquished.

The Superior Court Opinion is cited as Muhammad, et al. vs. Strassburger, et al, 374 Pa.Super. 613, 543 A.2d 1138 (1988).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. IS THE RULING OF THE SUPERIOR COURT, WHICH STATES THAT COLLATERAL ESTOPPEL DOES NOT BAR PLAINTIFFS' CLAIMS, IN CONFORMITY WITH PENNSYLVANIA LAW.

Addressed as per the Superior Court Opinion, below.

II. WHEN THE TRIAL COURT MAKES GRATUITOUS OBSERVATONS CONCERNING THE ADEQUACY OF THE SETTLEMENT OF A LEGAL MALPRACTICE CLAIM, ARE THE APPELLEES PRECLUDED UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL FROM LITIGATING A CLAIM FOR LEGAL MALPRACTICE WITH REGARD TO THE ADEQUACY OF THE SETTLEMENT IN THE MEDICAL MALPRACTICE CASE?

Answered in the negative by the Superior Court.

III. DOES THE PLAINTIFFS' COMPLAINT, WHICH ALLEGES DUTY, A BREACH OF THAT DUTY, AND CAUSATION, STATE A VALID CAUSE OF ACTION FOR LEGAL MALPRACTICE?

Addressed by the Superior Court in Footnote Number two (2) and remanded to the trial court for a decision.

IV. HAS THE LAW OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BEEN AUGMENTED BY OUR COURTS SINCE THE TIME THE COMPLAINT IN THIS MATTER WAS FILED SO THAT THE FABRIC OF THE PLAINTIFFS' EMOTIONAL DISTRESS ARGUMENT IS NO LONGER AN ISSUE IN THIS CASE?

This issue of emotional distress was raised but not addressed by the Superior Court in any capacity.

COUNTER-STATEMENT OF THE CASE

A. FACTS AND PROCEDURAL HISTORY

On November 7, 1977, Nazir Muhammad was born to Pamela Muhammad and Abdullah Muhammad, husband and wife, at Magee Women's Hospital in Pittsburgh. In November of 1977, a surgeon on the staff of Magee-Womens Hospital attempted to perform a circumcision on the infant boy, but through negligence failed to remove a sufficient amount of foreskin. As a result, the baby's penis had a redundant prepuce with phimosis, a condition which presented a health and hygiene hazard and which the plaintiff's son's pediatrician advised them to have corrected.

The parents took the infant to Children's Hospital for corrective surgery. On December 16, 1977, Doctor Stuart E. Price, Jr., a urologist, and Doctor Helen Westman, an anesthesiologist, members of the Children's Hospital staff, prepared for the operation. The anesthesia reagent, succinylcholine, was administered in preparation to be followed by general anesthesia. Although

complications developed, the doctors elected to proceed with the operation by penis injection of local anesthesia. The succinylcholine induced fatal pulmonary edema in the infant, and he died three days later from pulmonary insufficiency on December 19, 1977.

Three months later, Mr. and Mrs. Muhammad retained Attorney James Thomas, Jr., to represent them in a claim arising from the death of their baby son, Nazir Muhammad. Seven months later, in October, 1978, on the advice of Attorney Thomas, Mr. and Mrs. Muhammad retained Attorney Howard F. Messer and the partnership of Strassburger, McKenna, Messer, Shilobod and Gutnick to prosecute their claim.

Letters of administration for the estate of the infant were granted on October 28, 1978. In November, 1978, a complaint was filed with the Medical Arbitration Board against Children's Hospital of Pittsburgh, Stuart E. Price, Jr., M.D., and Helen Westman, M.D. A complaint was filed against the same defendants in the Court of

Common Pleas of Allegheny County on April 13, 1979. Following a pretrial conciliation conference before the Honorable Martin J. Wekselman, Attorney Messer informed Judge Wekselman that the Muhammads agreed to settle for $26,500.00.

The Muhammads relying on Attorney Messer, who asserted that they because of their status in life could expect no more for their son. Thereafter they became dissatisfied with what was told to them by Attorney Messer and with the settlement. On April 5, 1982, upon petition of Children's Hospital, the trial court issued a Rule to Show Cause why the settlement should not be enforced. The trial court held a hearing on the Rule on April 23, 1982. Still represented at the hearing by Attorney Howard F. Messer, Mrs. Muhammad expressed her opinion that the amount of $26,500 was unfair and inadequate for the loss of a child. (N.T., 4/23/82, at 3; R. R. 113a.) She also testified that the settlement was negotiated by unjust means and that she was represented poorly by her own attorney. (Id., at 3-4; R. R. 113-114a.) The court then

questioned her as to her authorization for her attorney to settle the case. She testified that she told him to do "whatever you feel is best," and that she authorized him to "settle for $23,000 if we can't go any higher." (Id., at 5; R. R. 115a.) The court held that Mrs. Muhammad:

> did indeed authorize a settlement even at $23,000 if counsel felt that were the proper settlement. The only difficulty is that she has changed her mind since that time and now believes the settlement to be inadequate. Having authorized the settlement, she is not privileged to change her mind at this point. Had counsel not been authorized to enter into the settlement that, of course, would have been an entirely different matter....

(Id. at 7; R. R. 117a.) Accordingly, the court ordered the enforcement of the settlement agreement and authorized appellees to pay the fund into court. To date, the Muhammads have not accepted that fund.

The Muhammads, then newly represented by undersigned counsel, appealed Judge Wekselman's decision to the Superior Court of Pennsylvania, at

No. 601 Pittsburgh, 1982. On November 23, 1984, a panel composed of Judges Rowley, Johnson and Popovich affirmed the order of the trial court. The memorandum opinion of this Court indicates that the affirmance was based on the holding that Mr. and Mrs. Muhammad authorized their attorney to settle their claim against Children's Hospital and Doctors Price and Westman.

Subsequent to taking the Superior Court appeal from the settlement of the medical malpractice case, the Muhammads brought an action alleging legal malpractice against the partnership of Strassburger, McKenna, Messer, Shilobod and Gutnick, and against Attorneys Messer and Thomas. Their complaint includes eight counts sounding in: fraudulent misrepresentation (deceit); fraudulent concealment (deceit); nondisclosure; breach of contract; negligence ("but for" standard); negligence ("substantiated facts" standard); outrageous conduct causing severe emotional distress; and breach of fiduciary obligation. The defendant attorneys filed preliminary objections in

the nature of a demurrer to a second amended complaint filed by the Muhammads.

By order dated January 13, 1987, the Honorable Marion K. Finkelhor sustained the defendant attorneys' demurrer and entered judgment in their favor. Her opinion issued in conjunction with that order states that the issue upon which she granted the demurrer was "whether plaintiff's [sic] cause of action is barred by the prior opinion of the Superior Court in this matter."

Plaintiffs appealed the decision of the trial court to the Superior Court. By order dated May 13, 1988, the Superior Court reversed the decision of the trial court and remanded the case for proceedings consistent with their opinion. The Superior Court opinion found that Appellant's cause of action was not barred by the prior decision in Muhammad v. Children's Hospital of Pittsburgh, 337 Pa.Super.Ct. 635, 487 A.2d 433 (1984) and, thus, a demurrer to the Muhammad's legal malpractice action could not be sustained.

Defendants petitioned the Superior Court for reargument of various issues. By Order of Court dated July 8, 1988, the Superior Court denied reargument in this case. Defendants have petitioned for allowance of appeal which has been granted by your Honorable Court.

SUMMARY OF THE ARGUMENT

The prior ruling in Muhammad v. Children's Hospital of Pittsburgh, 337 Pa.Super.Ct. 635, 487 A.2d 433 (1984) does not bar plaintiffs' legal malpractice claim since the requirements for collateral estoppel have not been satisfied. These four requirements are whether (one) the facts or facts at issue in both instances are identical; (two) the facts were essential to the first judgment; (three) the parties must have had the opportunity to actually litigate the issue; and (four) the facts must have been actually litigated in the first case. Indeed, the only factual issue determined in the first case was whether the plaintiffs authorizes Defendant-attorneys to settle their claim. Further, the adequacy of the settlement of the first case, which is the essence of the Plaintiffs' legal malpractice case, was simply not essential to the disposition of the first case.

Secondly, Plaintiffs contend that appellate courts are not bound to address all grounds for affirmance in reviewing decisions reached by lower courts.

While plaintiffs recognize the authority of this Honorable Court, this argument is based upon the importance of the role of the trial judge in shaping the trial process. The Court of Common Pleas of Allegheny County, in the instant case, sustained Defendant-attorneys' demurrer solely on the grounds of collateral estoppel; the sufficiency of the pleadings with respect to legal malpractice was never even addressed at the trial court level. The Superior Court, on appeal, accepted the limits of analysis established by the trial court and based their review only on collateral estoppel. It is wisdom to adhere to these limits as well; it is best for the Court of Common Pleas to rule on the sufficiency of the pleadings. The pleadings, in the determination and judgment of the trial court, must be sufficient to permit a fair presentation of the harm asserted. The trial court is in the best position to remedy, by way of allowing any amendments, any insufficiency that may occur.

Lastly, plaintiffs argue that their complaint sets forth a cause of action for legal malpractice. The

plaintiffs' complaint states that they employed Defendant-attorneys to prosecute their claims arising from the death of their infant son. This established the Defendant-attorneys' duty to act on behalf of the plaintiffs.

The plaintiffs' complaint states that Defendant-Attorneys negligently failed to sue the actual tortfeasors in the first case; instead, they brought suit against two physicians with recognized, valid defenses for their actions. This allegation is sufficient to plead breach of the duty of care owed to the plaintiffs by the Defendant-attorneys. The plaintiffs' complaint also states that as a direct and proximate result of the tortfeasors in the first case, the plaintiffs were deceived and forced into accepting an inadequate settlement amount. This allegation is sufficient to prove causation.

ARGUMENT

I. THE RULING OF THE SUPERIOR COURT, THAT COLLATERAL ESTOPPEL DOES

NOT BAR PLAINTIFFS' CLAIMS, IS IN CONFORMITY WITH PENNSYLVANIA LAW.

The plaintiffs' claims are not barred by the doctrine of collateral estoppel. For the doctrine of collateral estoppel to apply, it must appear that:

1. the fact or facts at issue in both instances are identical;
2. the facts were essential to the first judgment;
3. the parties must have had an opportunity to actually litigate the issue; and
4. the facts were actually litigated in the first cause.

Schubach v. Silver, 461 Pa. Super. 366, 377, 379, 336 A.2d 328, 334, 334-35 (1975). See also Matson v. Housing Authority of Pittsburgh, 326 Pa. Super. 109, 473 A.2d 632 (1984); Long v. Long, 306 Pa.Super. 142, 452 A.2d 255 (1982); Lebeau v. Lebeau, 258 Pa. Super. 519, 393 A.2d 480 (1978). In the instant case, there is no similarity in identify as to the facts at issue in both cases. At issue in the

first case was whether the Defendant-attorneys, had authority to settle the medical malpractice claims brought by the plaintiffs. At issue in the second case was the adequacy of the settlement amount.

In addition, it follows that the adequacy of the settlement amount was not essential to the first case. The first case simply dealt with Defendant-attorneys' authority to settle plaintiffs' claims, and not the adequacy of that settlement amount.

Moreover, the adequacy of the settlement in the medical malpractice case was never actually litigated, and plaintiffs' have not yet had the opportunity to litigate it. the authority of Defendant-attorneys' to enter into a settlement on behalf of the plaintiffs was all that was litigated in the first case. Thus, the plaintiffs claims for legal practice of the Defendant-attorneys were not litigated in the prior ruling which only determined the settlement authority of the Defendant-attorneys.

More specifically, the Defendant-attorneys are arguing in the instant case that the adequacy of settlement issue was already addressed in plaintiff -

appellees' suit against Children's Hospital. The Superior Court of Pennsylvania disagreed, and instead adopted the plaintiffs argument. Muhammad v. Strassburger, et al., 374 Pa.Super. 613, 543 A.2d 1138 (1988). The plaintiffs argued that the only factual issue addressed in the first case was whether the plaintiffs authorized the Defendant -Attorneys to settle their claim. Muhammad, 543 A.2d at 1141. Further the Superior Court agreed with the plaintiffs that the adequacy of the settlement, which is at the heart of plaintiffs' legal malpractice case, was not essential to the disposition of the first case. Id. In other words, this is a determination that the doctrine of collateral estoppel should not apply to the instant case. This determination should be affirmed by this Honorable Court.

II. THE SUPREME COURT SHOULD NOT DECIDE ISSUES OF PLEADINGS IN THE ABSENCE OF

RULINGS BY THE SUPERIOR COURT AND THE COURT OF COMMON PLEAS.

Of course, plaintiffs recognize it is within the power and authority of this Court to address any grounds for affirmance it deems appropriate in reviewing decisions of lower courts. Plaintiffs do not dispute this fact.

However, the issues presented before this Court in the instant case are issues that are directly related to the trial of this case. The Court of Common Pleas of Allegheny County did not rule upon or discuss the sufficiency of the pleadings; instead, it only concerned itself with collateral estoppel. Indeed, the Court of Common Pleas granted Defendant-attorneys' demurrer solely on the grounds that plaintiffs' claims were barred by the doctrine of collateral estoppel.

In light of the fact that the Court of Common Pleas did not discuss the sufficiency of the pleadings when it sustained Defendants' demurrer, the Superior Court wisely limited its analysis to the

issues related to the doctrine of collateral estoppel. The basis of their wisdom is the importance of having the trial court form the pleadings. The trial court is the ideal forum for determining the sufficiency of the pleadings since it can immediately remedy any insufficiency by allowing insufficient pleadings to be amended.

Therefore, this Court, despite its wide authority to address all the grounds for affirmance it chooses to, should defer to the Court of Common Pleas since it is the ideal forum in which to address the sufficiency of the pleadings with respect to legal malpractice.

Where an appellate Court politely declines to determine or express any views on the validity of the cause of action and defers to the lower court for the lower court to decide the matter, then consideration should be given to the judgment of the appellate Court. With due deference to the power of the Supreme Court to pass judgment on this matter, the issue of whether the Appellees have

stated a valid cause of action in their complaint should be deferred to the trial court.

Considering that footnote 2 helps to fully explain the Superior Court's reasoning for its decision, it would be remiss to ignore it. Footnote 2 of the Superior Court's Opinion states:

> In their briefs, filed on appeal, both parties address the question whether, assuming our prior decision does not act as a bar, appellants' complaint otherwise sets forth a valid cause of action for legal malpractice. We note, however, that the trial court explicitly based its order upon the conclusion that our prior decision in Muhammad v. Children's Hosp. of Pittsburgh bars the present action. Accordingly, we need not determine, and we express no views regarding, the question whether appellants' complaint otherwise sets forth a valid cause of action. It will be for the trial court on remand to determine whether appellants' complaint otherwise sets forth a valid cause of action for legal malpractice.

Muhammad v. Strassburger, Supra., at page 1143.

If this is a matter for review by this Honorable Court, then this Court should find that there was a

valid cause of action which has been set forth in sufficient detail by the original Complaint in Civil Action, and that the Superior Court properly reviewed this matter. (See Pa.R.C.P., Rule 1019.)

It seems wise to follow the Superior Court. The Superior Court's scope of review was limited in that the Superior Court properly exercised its function of judicial review. In reaching a decision in this case, the Superior Court applied the recognized standards of appellate review regarding preliminary objections based upon a demurrer. In general, these standards state that:

> On appeal from the sustaining of a preliminary objection in the nature of a demurrer, the scope of review is limited: all material facts set forth in the complaint as well as all reasonable inferences are admitted as true for the purpose of the review, and where a doubt exists as to whether a demurrer should be sustained the doubt should be resolved in favor of overruling the demurrer.

ei bon ee baya ghananee v. Black, 350 Pa. superior Ct 134, 504 A.2d 281 (1986). Additional decisions

reflect this same standard. In the case of Cummins v. Firestone Tire and Rubber Co., 344 Pa. Superior Ct. 9, 495 A.2d 963 (1985), the Superior Court aptly summarized the law regarding appeals from orders sustaining preliminary objections in the nature of a demurrer. Therein the Superior Court stated:

> Initially, we observe that this Court's scope of review of a challenge to the sustaining of preliminary objections in the nature of a demurrer is a stringent one. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Cianfrani v. Com., State Employee's Retirement Bd., 505 Pa. 294, 479 A.2d 468 (1984). Any doubt should be resolved in favor of overruling the demurrer. Vattimo v. Lower Bucks Hospital, Inc., 502 Pa. 241, 465 A.2d 1231 (1983); In Re Estate of Thompson, 332 Pa. Super. 360, 481 A.2d 655 (1984); Del Turco v. Peoples Home Sav. Ass'n, 329 Pa. Super 258, 478 A.2d 456 (1984). If any theory of law will support a claim by the complaint, a dismissal is improper. Cianfrani v. Com., State Employee's Retirement Bd., supra. This Court in reviewing such an order, makes no

> factual finding with regard to the matters in dispute.

Cummins v. Firestone Tire and Rubber Co., supra. 495 A.2d 963 at 967. Thus, the appellate courts are not bound to address all grounds for affirmance in reviewing decisions of lower courts. Therefore, the decision of the Superior Court should be affirmed.

III. THE PLAINTIFFS' COMPLAINT, WHICH ALLEGES DUTY, BREACH OF THAT DUTY, AND CAUSATION, SETS FORTH A VALID CAUSE OF ACTION FOR LEGAL MALPRACTICE.

The law of legal malpractice in Pennsylvania is clearly applicable to the instant case. The following elements must exist in order for there to be a cause of action in legal malpractice:

1. The employment of an attorney or other basis for duty;
2. The failure of the attorney to exercise ordinary skill or knowledge; and

3. That such negligence was the proximate cause of damages to the plaintiff.

ei bon ee baya ghananee v. Black, supra. Those three elements are clearly present in the instant case. First, plaintiffs employed Defendant-Attorney James Thomas to represent them in the claims arising out of the death of their infant son. Defendant-Attorney James Thomas referred the matter to Defendant-Attorney Messer and the defendant law firm who were then also employed by the plaintiffs. The employment of the attorneys is alleged in paragraph 9 of the complaint.. (Complaint paragraphs number 9 and 10, R.R. at 59a-60a.) Thus the language used in the Complaint is sufficient pleading of the employment of an attorney for the duties that follow such employment.

Secondly, Defendant-Attorneys clearly did not exercise ordinary care in the instant case. The complaint states that despite holding themselves out as possessing the required skill and knowledge, the Defendant-Attorneys did not possess the ordinary

skill and knowledge to comprehend patient charts, to uncover and understand adverse reactions of medications and anesthesia in children, to select the correct skilled help in analyzing the medical facts, to obtain and comprehend the manufacturer's package insert, and to inquire into the significance of the failed circumcision upon Nazir Muhammad (Amended Complaint at paragraphs 49, 50 & 51; R.R. at 74a.)

In addition the complaint alleges that the defendant-attorneys did not bring suit against the actual tortfeasors in the first place; namely, Magee-Womens Hospital, its employee surgeon, Children's Hospital and the manufacturer-seller of the succinylcholine. Further, the defendant-attorneys did not pursue with due diligence the cause of action for informed consent. (Amended Complaint at paragraphs 48(d), 48(e) & 53.; R.R. at 74a and 75a.) Finally, the complaint alleges that the Defendant-Attorneys failed to properly pursue the only claim they had instituted in that the defendants failed to make any investigation of the medications

and the anesthesia procedure, failed to take timely depositions, failed to make necessary inquiries to discover what was discoverable about succinylcholine and its packaging, failed to properly advise the plaintiffs on how to pursue additional claims, and failed to file an expert report in compliance with the Allegheny County Rules of Civil Procedure, Rule 212. (Amended Complaint at 48(a), 48(b), 48(c) & 46.; R.R. at 72a-73a.) Thus, it is clear that the complaint sets forth, in detail, allegations that the appellant-attorneys failed to exercise ordinary skill and knowledge while representing appellees, and the complaint clearly satisfies the second element of the test.

The Defendant's reliance on Schenkel v. Monheit, 266 Pa.Super 396, 405 A.2d 493 (1979), to show plaintiffs' allegations of breach are not sufficient to state a cause of action grounded in legal malpractice is misplaced. In Schenkel, the Superior Court of Pennsylvania held that:

> [A]ttorney was not liable for malpractice for failing to join corporate defendant, allegedly liable on basis of respondent superior, in prior personal injury action in absence of showing that failure to join the corporation was proximate cause of allegedly inadequate verdict on issue of damages in the prior action. (Emphasis added)

Schenkel, 405 A.2d at 493. In Schenkel, Defendant Attorney sued the driver of an automobile for injuries sustained by plaintiff in an automobile collision. Defendant Attorney did not sue the driver's employer, even though the driver was on the job at the time of the accident. After an unsatisfactory jury award, the plaintiff sued the Defendant Attorney for failing to bring suit against the employer on the theory that a greater amount of money could have been obtained by settlement or verdict from the employer. The Superior Court did not consider the failure to sue the employer to be a breach of ordinary care. The Court's reasoning was that the failure to join the driver's employer did not adversely affect Plaintiff's right

to damages. The employee and the employer were both liable only because of the employees' negligence.

However, the instant case differs greatly from Schenkel. In the instant case, Plaintiffs allege Defendant-attorneys breached their duty of care by failing to sue the actual tortfeasors; while in Schenkel the alleged breach was the failure to sue the employer who was a tortfeasor in no different position than the employees. This is a critical difference, since it has a direct and substantial result on the right to recover at all; hence on the amount of damages recoverable. Notwithstanding the $26,500, the infant's death was in fact caused by the failure of the drug sellers (Children's Hospital and the manufacturer); and the surgeon and his employer because of the negligent partial removal of the foreskin. The drug sellers were simply not sued by the Defendants. The injury and death both followed causally from the negligence of the employee physician of Magee-Womens Hospital in performing the incomplete foreskin removal. As a

direct and proximate result of the defendant-attorney's negligent failure to bring suit against the offending parties, the Plaintiffs were maneuvered by the defendant-attorneys into accepting an inadequate settlement amount for the death of the infant son. Thus, the Defendant-attorneys breached the duty of ordinary care since the actual tortfeasors were not sued, and a product liability claim was not made. Therefore, Defendants' reliance on Schenkel is misplaced and the Plaintiffs' allegations of beach of the standard of ordinary care are sufficient to establish a cause of action for legal malpractice.

Lastly, Defendant-attorneys negligence was clearly the proximate cause of Plaintiffs' loss. This element is set forth in the complaint wherein it alleges that, but for the negligence of the defendant-attorneys in omitting parties and causes of action against the parties, it is asserted that the plaintiffs would have been successful at a jury trial or settlement in excess of $26,500. (Amended Complaint at paragraphs 45 & 54; R.R. at 72a and

75a.) The defendants actions were the legal cause of the plaintiffs suffering pecuniary loss. (Amended complaint at paragraph 52; R.R. at 74a.)

Thus these allegations are a sufficient pleading of causation. Therefore, Plaintiffs' complaint sets forth a cause of action for legal malpractice. It is submitted that, when ruling upon a demurrer, these allegations suffice to preclude entry of judgment. Chorba v. Davlisa Enterprises, Inc., 303 Pa.Super. 497, 450 A.2d 36 (1982).

It must be emphasized that proximate cause was clearly pleaded in Plaintiffs' Complaint. The relevant law requires that in order to prove causation in a legal malpractice case, the plaintiff must prove actual loss. Pashak v. Barish, 303 Pa. Super. 18, 450 A.2d 67 (1982). However, speculative harm does not suffice to create a cause of action. Budd v. Nixon, 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 852, 491 P2d, 433, 436 (1971). In the instant case, Plaintiffs' damages are clearly not speculative; indeed, their damages are quire certain. The applicable law states that "damages are

speculative only if the uncertainty concerns the fact of damages rather than the amount." (Emphasis added) Pashak, supra. In Pashak, the Superior Court of Pennsylvania, held that plaintiff-appellants loss "was too conjectural and remote to warrant recovery in legal malpractice action." Id, 450 A2d at 68. The Court's reasoning was that the plaintiff-appellant had not yet suffered, and may never suffer, the harm she alleged, since "her rights would not vest until her husband's death and were conditional upon her surviving him." Id., at 69. Thus, in Pashak, the plaintiff-appellant did not have a cause of action for legal malpractice because she had not suffered a loss.

However, in the instant case, Plaintiffs have clearly suffered a loss. The plaintiffs suffered a loss because of the defendant-attorneys breach of their duty of ordinary care. Again, the defendant-attorneys breach of their duty of ordinary care was their negligent failure to sue the actual tortfeasor responsible for plaintiffs' harm. This loss that proximately resulted from defendant-attorneys'

breach is that plaintiffs were forced to accept an inadequate settlement amount for the death of their infant son, baby Muhammad. Thus, plaintiffs' damages are not speculative since there is a great deal of certainty as to the fact of damages. Therefore, Plaintiffs have suffered an actual loss which has been sufficiently pleaded in their complaint.

Defendant-Appellant's reliance on Mariscotti v. Tinari, 335 Pa. Super. 599, 485 A.2d 56 (1984), for the proposition that diminished settlement value does not set forth the required level of harm is clearly misplaced. In Mariscotti, the Superior Court of Pennsylvania held:

> Whether wife could have obtained a better settlement and how much better if she had known the value of the stock was speculative, thus defeating any cause of action for malpractice...

Mariscotti v. Tinari, 405 A.2d at 56. In Mariscotti, plaintiff brought suit against her divorce attorney alleging that while representing her in her marriage dissolution proceedings, he

gave her an incorrect evaluation of the stock owned by her husband. This alleged error, in turn, supposedly kept her from obtaining the best possible property settlement. However, because the stock was in her husband's name and she could not force her husband to transfer those stock holdings to her, she was not "entitled to 'equitable distribution' of her husband's separate property." Id., at 58. She did not have a legal basis for her argument which entitled her to recovery under the laws of equitable distribution. Thus, in absence of the legal support for her claims, her harm was too speculative to allow recovery for counsel's alleged dereliction." Id, at 58.

Contrary to Mariscotti, in the instant case, Plaintiffs have unquestionable legal support for their allegations of actual loss. As stated at length above, the essential elements for a cause of action grounded in legal malpractice, namely duty, breach and causation, are clearly present in the instant case. Indeed, defendant-attorneys, who were hired by the plaintiffs, breached their duty of ordinary

care owed to the plaintiffs by negligently failing to sue the actual tortfeasors responsible for the death of their infant son. As a result of this breach of the duty of ordinary care, Plaintiffs suffered an actual loss in that they were deceived and forced to accept an inadequate settlement amount for the death of their infant son. Thus, with clear legal support for their claims, Plaintiffs' allegations are not speculative and permit recovery for Defendant-Appellants alleged malpractice.

As an aside, it must be added that defendant-attorneys failed to reconcile the fact that this appeal was specifically directed at the demurrer granted by the trial court and not at the issue of damages. Stated at length above, ...damages are speculative only if the uncertainty concerns the fact of the damages rather than the amount. Mariscotti v. Tinari, supra, at 602, 485 A.2d at 57 (emphasis added). Plaintiffs therefore recognize that the fact of damages will be a necessary item of proof at trial, but at the present stage of the pleadings in the trial court, a ruling on preliminary objections,

plaintiffs could have done no more than plead that defendant-attorneys' malpractice caused actual pecuniary loss, as they did. a demurrer, which admits all allegations in the complaint, cannot be granted in favor of the defendant-attorneys who, upon demurring to the Complaint, are deemed to admit that their professional malpractice caused pecuniary damage to the plaintiffs as the complaint alleges in paragraphs 14, 15, 16, 29, 43 and 54, R.R. at 61a-62a, 10a-11a, 14a-15a, 75a

IV. THE LAW OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS HAS BEEN AUGMENTED BY OUR COURTS SINCE THE TIME THE COMPLAINT IN THIS MATTER WAS FILED SO THAT THE FABRIC OF THE PLAINTIFFS' EMOTIONAL DISTRESS ARGUMENT IS NO LONGER AN ISSUE IN THIS CASE.

Notwithstanding the fact that the Plaintiffs have set forth a claim for intentional infliction of

emotional distress, according to the Restatement (Second) of Torts, Section 46, they are not going forward with this particular claim.

CONCLUSION

For all of the foregoing reasons, the decision of the Superior Court should be affirmed without modification, and this case should be returned to the Court of Common Pleas and the Plaintiffs should be permitted to pursue their claim.

Respectfully Submitted by:

Kenneth W. Behrend
Attorney for Appellees

BEHRHREND and ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

IN THE SUPREME COURT OF PENNSYLVANIA

No. 5 W.D. Appeal Docket 1989

PAMELA MUHAMMAD, Administratrix fo the
Estate of NAZIR MUHAMMAD and
ABDULLAH MUHAMMAD

vs.

STRASSBURGER, McKENNA, MESSER, SHILOBOD
and GUTNICK, a law partnership;
HOWARD MESSER and JAMES TOMAS, JR.

Appeal of
STRASSBURGER, McKENNA, MESSER, SILOBOD
and GUTNICK, a law partnership;
and HOWARD MESSER

PETITION FOR REARGUMENT OF OPINION FILED BY THIS HONORABLE COURT ON MARC 15, 1991

Appeal of the Order, Entered May 13, 1988
by the Superior Court of Pennsylvania,
(Reargument Denied July 8, 1988) at No. 218 Pgh. 1987,
reversing the Order, entered January 13, 1987, by the Court
of Common Pleas of Allegheny County, Pennsylvania
Civil Division at No. G.D. 84-6520

Kenneth W. Behrend
PA I.D. No. 00406

BEHREND AND ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

ATTORNEY FOR APPELLEES PAMELA
MUHAMMAD ADMINISTRATRIX OF
THE ESTATE OF NAZIR MUHAMMAD
AND ABDULLAH MUHAMMAD

Petitioners request that this Honorable Court grant reargument to address the conclusions stated in footnote 13 of this Honorable Court's opinion. In said footnote, it is stated that there is no prima facie showing of harm, and no articulable errors alleged in the Second Amended Complaint. This is incorrect.

We agree that "Monday morning quarterback" suits should not be condoned. However, that is not what we are suggesting occurred here, nor is it what we are urging the Court to accept.

If this were a case of "second guessing" the strategy of the original attorney, we would agree with this Court's decision. "Second guessing" would be where the original attorney had decided to choose between two equally responsible defendants, and the reviewing attorney would assert that the first attorney chose the wrong defendant. That is not what occurred here.

Plaintiffs' counsel sued the anesthesiologist. Plaintiff's counsel then failed to timely discover that it was not the anesthesiologist who was at fault;

it was the drug manufacturer who was at fault for failing to include a warning with regard to pediatric usage. The articulable error was in suing someone who had an absolute defense - and in not suing another party who had, (by its inclusions of later warnings), in effect admitted its liability on 402A grounds. The substantive case against the physician virtually did not exist, except for minimal settlement value. The substantive case against the drug manufacturer was a very strong one. (It is counsel's opinion, based upon experience, that this claim would settle well into the six figures.) Failing to pursue the latter case certainly decreased the amount of money Plaintiffs would have received.

In relation to an articulable error, vis-a-vis failing to plead statute of limitations, paragraphs 16 & 48(e) specifically set forth that the statute of limitations was missed by the original attorney. (See paragraphs 16 and 48(e) of the Second Amended Complaint.) As to damages, paragraphs 16 & 54, set forth that if the claim had been timely

filed, the case would have been worth a figure substantially in excess of $26,500. (The lost wages alone for a minor at minimum wages would be well into six figures). (See paragraphs 16 & 54 of the Second Amended Complaint).

Based upon this apparent misunderstanding of our arguments presented, and the contents of the Second Amended Complaint, we respectfully request reargument.

Respectfully submitted,

/s/ ***Kenneth W. Behrend***

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,

v.

STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; HOWARD MESSER and JAMES THOMAS, JR.

APPEAL OF STRASSBURGER, McKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; and HOWARD MESSER

No. 5, W.D. APPEAL DOCKET 1989

Appeal from the Order of Superior Court at No. 218 Pittsburgh, 1987, entered May 13, 1988, reversing the Order of the Court of Common Pleas, Civil Division, Allegheny County, entered January 13, 1987 at No. GD 84-6520 and remanding the case.

374 Pa. Super 613, 543 A.2d 1138 (1988)

ARGUED: March 5, 1990

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the **SUPERIOR COURT OF PENNSYLVANIA** be, and the same is, hereby reversed and the within complaint is dismissed.

/s/ IRMA T. GARDNER
Deputy Prothonotary

DATED: March 15, 1991

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,

Appellees

vs

STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; HOWARD MESSER and JAMES THOMAS, JR.,

APPEAL OF STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; and HOWARD MESSER

No. 5, W.D. APPEAL Dkt 1989

Appeal from the Order of Superior Court at No. 218 Pittsburgh, 1987, entered May 13, 1988, reversing the Order of the Court of Common Pleas, Civil Division, Allegheny County, entered January 13, 1987 at No. GD 84-6520 and remanding the case.

374 Pa. Super 613, 543 A.2d 1138 (1988)

ARGUED: March 5, 1990

OPINION OF THE COURT

MR. JUSTICE CAPPY* FILED: MARCH 15, 1991

We granted allocatur to determine whether the appellees' claim of legal malpractice stemming from their dissatisfaction with the settlement of their prior medical malpractice action is barred by

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* This opinion was reassigned to this writer.

the doctrine of collateral estoppel and whether, as a matter of law, the appellees have alleged sufficient facts to entitle them to proceed with their action. For the reasons set forth herein, we hold that the case sub judice is not barred by the doctrine of collateral estoppel, but that the appellees have failed to allege sufficient facts, which if proved, would entitle them to relief.

FACTUAL AND PROCEDURAL HISTORY

The facts of this case and its procedural history are so entwined that we must address them together.

On November 7, 1977, Pamela Muhammad and Abdullah Muhammad, husband and wife, had a son, Nazir, born to them at Magee-Womens Hospital in Pittsburgh, Pennsylvania. Upon the parents' request, a circumcision was performed on baby Nazir, but the procedure apparently failed to remove the entire foreskin.

Subsequent to the initial circumcision, a second procedure was scheduled at Childrens' Hospital in Pittsburgh on December 16, 1977. During the surgery, the infant suffered pulmonary edema as a consequence of the general anesthesia and died three days later.

Appellees initially retained the services of the appellant, attorney James Thomas, Jr., to represent them in the claim arising from the death of their son. At the suggestion of Mr. Thomas, the appellees subsequently retained the services of the appellant law firm of Strassburger, McKenna, Messer, Shilobod and Gutnick. Mr. Messer assumed control of the case and filed a complaint against Children's Hospital, Dr. Stuart E. Price, Jr., (the urologist who performed the second circumcision) and Dr. Helen Westman (the attending anesthesiologist).

After the depositions of the above named physicians, settlement negotiations began and the defendants offered a settlement figure of $23,000 to the Muhammads. The Muhammads communicated

their acceptance of the offer to their attorneys. At a pre-trial conference, the defendants increased the offer to $26,500 at the suggestion of the court. That settlement offer was accepted by the appellees.

At some point thereafter, the appellees informed their attorneys of their dissatisfaction with the amount of the amount of the settlement. The appellants communicated their clients' dissatisfaction to the opposing side, prompting the attorneys for the defendants to petition the trial court for a Rule to Show Cause why the settlement agreement should not be enforced.

After an evidentiary hearing, the court determined that the appellees had agreed to the $26,500 settlement and had communicated such agreement to the appellants. Based on those facts, the trial court upheld the settlement agreement, ordered the defendants to pay the settlement sum, and instructed the prothonotary to mark the docket settled and discontinued when the funds were received.

Appellees obtained new counsel and appealed to the Superior Court, which affirmed the settlement

order. Muhammad v. Childrens' Hospital of Pittsburgh, 337 Pa. Super. 635, 487 A.2d 443 (1984) (unpublished memorandum opinion).

The Muhammads then filed the instant legal malpractice suit against the attorneys who had represented them in the medical malpractice case.[1] In response to appellee's second amended complaint, the appellants' filed preliminary objections in the nature of a demurrer, alleging inter alia, that the current action should be dismissed because it sought to relitigate the settlement and because the Muhammads' claim of loss was too speculative and thus failed to state a cause of action. The trial court granted the preliminary objections on the basis that the action was barred by the Superior Court's decision in the medical malpractice case (collateral estoppel).

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[1] The Muhammads' second amended complaint contains the following counts: Fraudulent Misrepresentation (deceit); Fraudulent Concealment (deceit); Nondisclosure; Breach of Contract; Negligence; Outrageous Conduct Causing Severe Emotional Distress and Breach of Fiduciary Duty.

On appeal, the Superior Court reversed the decision of the trial court, holding that the order sustaining the preliminary objections could not be affirmed upon the doctrine of collateral estoppel.

DISCUSSION

At the outset, we agree with the Superior Court that the appellees instant action is not barred by the doctrine of collateral estoppel. In order to grant a demurrer pursuant to that doctrine, the objecting party must show that "the fact or facts at issue in both instances were identical; [and] that these facts were essential to the first judgment and were actually litigated in the first cause." Schubach v. Silver, 461 Pa. 366, 377, 336 A.2d 328, 334 (1975). We have also required that the party against whom a plea of collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in question in a prior action. In re Ellis' Estate, 460 Pa. 281, 287, 333 A.2d 728, 731 (1975). The issue in the first case was whether Mrs. Muhammad had

authorized the settlement. The issues in the case before us are whether the attorney appellants were negligent and/or deceitful in their representation of the Muhammads and, if so, whether the Muhammads suffered harm as a result. It is thus evident that the matter is not barred by the doctrine of collateral estoppel as there are issues in this case that were not litigated in the medical malpractice case.

Although we find that collateral estoppel does not bar this action, we do not believe that our inquiry need or should cease there. Rather, preliminary objections should have been granted due the appellees' failure to state a claim for which relief can be granted.

This case must be resolved in light of our long-standing public policy which encourages settlements. Simply stated, we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action.

An action should not lie against an attorney for malpractice based on negligence and/or contract principles when that client has agreed to a settlement. Rather, only cases of fraud should be actionable.

In order to reach this conclusion, we review the facts of this case as they have evolved in the courts of the Commonwealth. In deciding this case, we are mindful of our standard of review for preliminary objections. As we said in the case of Vattimo v. Lower Bucks Hosp., Inc., 502 Pa. 241, 465 A.2d 1231, 1232-33 (1983):

> All material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for [the purpose of this review.] Clevenstein v. Rizzuto, 439 Pa. 397, 266 A.2d 623 (1970). The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970). Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of

overruling it. Birl v. Philadelphia Electric Co., 402 Pa. 297, 167 A.2d 472 (1960).

Our review of this case begins with the settlement that occurred in the medical malpractice action. The essence of a settlement is contractual in nature. There is an offer (the settlement figure), acceptance, and consideration (in exchange for the plaintiff terminating his lawsuit, the defendant will pay the plaintiff the agreed-upon sum). Thus, the trial court's enforcement of that settlement was merely upholding the terms of a binding contract.

In the medical malpractice case which preceded the case sub judice, a binding contact was formed; Mrs. Muhammad agreed to the offered settlement of the defendant-physicians and communicated such agreement to her attorney. The plaintiffs agreed to dismiss the suit in exchange for the defendants paying the sum of $26,500. It was only after that contract was formed that she decided--for reasons unknown at that time--that it just was not enough money. Her change of mind, however, did not

entitle her to have the settlement agreement set aside. As this court has stated;

> The law demands of every man who bargains with another that he should do so only after due reflection of the possible consequences of his bargain and if he misjudges the consequences that could have been expected by a reasonably intelligent man, he cannot rely on the law to remedy his fecklessness. New Charter Coal Co. v. McKee, 411 Pa. 307, 312, 191 A.2d 830, 833 (1963).

This situation has been referred to as the "too bad category" of contracts; although a party to a contract believes he might have made a better deal after he agreed to the original contract, he is nonetheless bound by the terms of that primary agreement. The courts of this Commonwealth, relying on established principles of contract law, upheld the Muhammads' settlement agreement.

Nevertheless, due to their dissatisfaction with the settlement, the Muhammads subsequently filed the instant action against the attorneys who represented them throughout the medical malpractice case;

alleging negligence, breach of contract, fraudulent concealment and nondisclosure.

Based on our strong and historical public policy of encouraging settlements, we do not believe that the Muhammads should be permitted to continue with this lawsuit.

The primary reason we decide today to disallow negligence or breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients is that to allow them will create chaos in our civil litigation system. Lawyers would be reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that "could have been done, but was not." We refuse to endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases. A long-standing principle of our courts has been to encourage settlements; we will not now act so as to discourage them.

In fact, this court promulgated Pa.R.C.P. 238 for the express purpose of encouraging pre-trial settlement. "Thus, the format of Rule 238 is responsive to its fundamental goal of prompting meaningful negotiations in major cases so as to unclutter the courts." Laudenberger v. Port Auth. of Allegheny Cty., 496 Pa. 52, 60, 436 A.2d 147, 151 (1981), appeal dismissed, sub nom, Bucheit v. Laudenberger, 456 U.S. 940 (1982). Although Rule 238 was declared unconstitutional in Craig v. Magee Mem. Rehab. Ctr., 512 Pa. 60, 515 A.2d 1350 (1986), the importance of settlements was never challenged. Moreover, the new Rule 238 now stands as direct evidence of our commitment to meaningful negotiations for settlement.[2]

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[2] The current Rule 238 of the Pennsylvania Rules of Civil Procedure provides, in pertinent part, that:

> (a)(1) At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff. . . .

The explanatory comment following the Rule states that the "Court in Craig did not 'overrule the rationales of Laudenberger. . . for they have validity of their own in the

In 1982, the then Chief Justice of the United States Supreme Court, Warren Burger, addressed the American Bar Association and focused on the growing wave of litigation that threatened to overwhelm our legal system.[3] The Chief Justice centered his concern on the "delay and lack of finality"[4] in litigation and remarked that "[i]t appears that people tend to be less satisfied with one round of litigation and are demanding a 'second bite of the apple' far more than in earlier times."[5] Particularly troublesome to the efficacy of the courts are these "second bite" cases; they require twice the resources as a single case, yet resolve only a single litigant's claims--thus denying access to the courts to litigants who have never had a single reso-

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context of the ends sought,' [cite omitted]. . . Laudenberger set forth two purposes for Rule 238: (1) to alleviate delay in the courts, and (2) to encourage defendants to settle meritorious claims as soon as reasonably possible."

[3] Burger, Isn't There a Better Way?, 68 A.B.A.J. 274 (1982).

[4] Id. at 274.

[5] Id. at 275.

lution of their dispute. For that reason, henceforth we should view "litigation concerning litigation" cases with a jaundiced eye.

Numerous commentators have addressed the problem of overcrowded courts and the importance of settlements to the efficient flow of justice.[6] A fundament of those articles is that settlement of civil litigation is critical to the courts' management of caseloads. Without settlement of cases, litigants would have to wait years, if not decades, for their day in court. Nearly 90% of all matters in controversy end in settlement.[7] Were we, as a court, to encourage litigation that would undermine the current rate of settlements, we would do a grave injustice and disservice to the citizens of the

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[6] See, e.g., Title, The Lawyer's Role in Settlement Conferences, 67 A.B.A.J. 592 (1981); Menkel-Meadow, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference, 33 UCLA L. Rev. 485 (1985); McThenia & Shaffer, For Reconciliation, 94 Yale L.J. 1660 (1985).

[7] Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and This We Know) About Our Allegedly Contentious Society, 31 UCLA L.Rev. 4 (1983).

Commonwealth. "The settlement of cases before trial is one of the greatest potentials for assisting the courts to reduce their caseloads."[8] As courts are fond of repeating, "[j]ustice delayed is justice denied." See e.g. Stottlemyer v. Stottlemyer, 458 Pa. 503, 522, 329 A.2d 892, 901 (1974), Roberts, J., dissenting.

The Pennsylvania Constitution also expressly recognizes that access to the courts without delay is a right to be enjoyed by all citizens. "All courts shall be open; and every man for an injury done him. . . shall have remedy by due course of law, and right and justice administered without . . . delay." Article I, Section 11 (emphasis supplied).[9]

In addition to promoting settlements for purposes of judicial economy, there are other, more

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[8] Title, supra, at 592.

[9] We do not mean to suggest that all wrongs can be remedied by means of the court system. Many wrongs do not have a correlative legal remedy and many wrongs must be pursued by avenues other than the court system. For example, workers injured on the job may not sue their employers; the sole redress is through the worker's compensation arbitration system.

significant reasons that we encourage them. Professor Menkel-Meadow provides a compelling and eloquent statement of the purposes of settlements in her article, For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference;

> What a settlement offers is a substantive justice that may be more responsive to the parties' needs than adjudication. Settlement can be particularized to the needs of the parties, it can avoid win/lose, binary results, provide richer remedies than the commodification or monetarization of all claims, and achieve legitimacy through consent. In addition, settlement offers a different substantive process by allowing participation by the parties as well as the lawyers. Id. 33 UCLA L. Rev. at 504-05.

Additionally, settlements reduce the stress and concrescent negativity associated with protracted litigation. As Abraham Lincoln remarked, "[p]ersuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser--in fees, expenses, and

waste of time."[10] Those entering into litigation do not do so with an attitude of insouciance; rather, they often engage their adversary with bellicosity, determined to be the victor at any price--even if that victory is a Pyrrhic one. There is frequently more than one losing party at the end of any litigation.

Protracted litigation is also counterproductive to businesses and to workers. In spending so much time and energy on the lawsuit, litigants neglect the positive and productive aspects of their lives. Those who are involved in lawsuits often do so to the detriment of their lives, their businesses and their families. It is more important for our society to encourage citizens and businesses to retreat from litigation and return to their lives. It little profits society and its citizens to be overly engaged in the business of litigation. Rather, everyone benefits from litigants resolving their disagreements, set-

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10 This statement is quoted in Burger, supra, at 275.

tling their disputes and returning to the business of being productive members of society.

Mindful of these principles, we foreclose the ability of dissatisfied litigants to agree to a settlement and then file suit against their attorneys in the hope that they will recover additional monies. To permit otherwise results in unfairness to the attorneys who relied on their client's assent and unfairness to the litigants whose cases have not yet been tried. Additionally, it places an unnecessarily arduous burden on an overly taxed court system.

We do believe, however, there must be redress for the plaintiff who has been **fraudulently induced** into agreeing to settle. It is not enough that the lawyer who negotiated the original settlement may have been negligent; rather, the party seeking to pursue a case against his lawyer after a settlement must plead, with specificity, fraud in the inducement. "One may not. . .induce another to contract by fraudulent misrepresentations." College Watercolor Group, Inc. v. William H.

Newbauer, Inc., 468 Pa. 103, 115, 360 A.2d 200, 206 (1976).

If the lawyer knowingly commits malpractice, but does not disclose the error and convinces the client to settle so as to avoid the discovery of such error, then the client's agreement was fraudulently obtained. This fraudulent inducement, however, does not alter the settlement agreement between plaintiff and defendant, since it is not the opposition who has committed the fraud, but the plaintiff's own lawyer. As such, the settlement agreement must be honored.

So that the plaintiff who has been defrauded may have redress, however, we would permit him to proceed under a theory of fraud against the attorney who represented him in the original action. This holding would reflect the law as it has long existed in the Commonwealth; "[i]t is scarcely necessary at this late jurisprudential hour in the day of stare decisis to cite cases to certify that fraud taints with illegality and invalidity anything its evil

shadow darkens." Iacoponi v. Plisko, 412 Pa. 576, 581, 195 A.2d 362, 365 (1963).[11]

In the event a litigant believes he has been fraudulently induced into settling, he has the right to file a suit, alleging with specificity the acts that he claims are fraudulent. If his allegations meet the standard of specificity required by Pa. R.C.P. 1019(b), then he will be allowed to proceed. In the event those allegations do not meet the standard of specificity, then the case will be dismissed upon the filing of preliminary objections.

Turning to the facts of the case currently before us, the plaintiffs have filed a complaint in which they seek damages for, inter alia, fraudulent concealment and nondisclosure. The alleged basis of this deceit is that the attorneys were negligent and in an attempt to cover up their negligence, convinced the Muhammads to agree to the settlement.

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[11] Where, however, an attorney discloses to this client that he has committed malpractice that affects the value of the case, but the client agrees to settle anyway, that client would also be barred from later suing the attorney.

The allegations, as they are set forth in the complaint, are mere suppositions. The complaint alleges a failure to sue another hospital and a drug manufacturer (arguably negligence claims) as the basis for the fraud. The fatal flaw with this bootstrapping, however, is the failure to cite with any specificity how the defendant attorneys acted with fraud as opposed to mere negligence. Rather, the complaint goes on at great length to ascribe the acts of the defendant attorneys to "evil motive with an attempt to deceive and mislead." Unless the plaintiff can more fully describe what facts support the defendant attorneys' "evil motives," we consider those allegations as nothing more than unfounded accusations which have no apparent basis in fact.[12]

Both Rule 1019(b) of the Pennsylvania Rules of Civil Procedure and case law require that fraud be plead with specificity. See, e.g., Local 163,

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12 We take note of the fact that the complaint forming the basis of the case before us is the plaintiffs' third attempt to draft a complaint that survives preliminary objections. The complaint we are reviewing is the plaintiffs' second amended complaint.

International Union of United Brewery, etc. v. Watkins, 417 Pa. 120, 207 A.2d 776 (1965). The appellees' complaint does not rise to the level of specificity that we require.[13]

Accordingly, for these reasons set forth herein, we hold that the plaintiffs' complaint does not establish sufficient facts, which if proved, would

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13 Aside from compelling public policy reasons for dismissal and aside from appellants' failure to plead fraud with sufficient specificity, we not that the plaintiffs have not made a prima facie showing that the alleged failings of the lawyers decreased the amount of money they would have received; they point to no articulable error--such as missing a statute of limitations or being barred from presenting expert testimony due to the failure to file an expert report--which would substantially decrease or eliminate the value of their case. There is thus a fatal failure to show the harm suffered. Because the harm suffered is so speculative, this complaint could not have survived under contract or tort principles, even if the plaintiff would have been allowed to sue on those principles. See, e.g., Mariscotti v. Tinari, 335 Pa. Super. 599, 485 A.2d 56 (1984).

It becomes obvious that by allowing suits such as this, which merely "second guess" the original attorney's strategy, we would permit a venture into the realm of the chthonic unknown. It is impossible to state whether a jury would have awarded more damages if a suit had been filed against another potential party or under another theory of liability. It is indeed possible that a smaller verdict would have been reached or a defense verdict ultimately would have been rendered. Thus, sanctioning these "Monday-morning-quarterback" suits would be to permit lawsuits based on speculative harm; something with which we cannot agree.

entitle them to relief. Because "on the facts averred, the law says with certainty that no recovery is possible," Hoffman v. Misericordia Hospital of Philadelphia, supra, at 503, 267 A.2d at 868, we reverse the decision of the learned Superior Court and dismiss the within complaint.

It is so ordered.

Mr. Justice Larsen files a dissenting opinion in which Mr. Justice Zappala joins.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,

Appellees

vs

STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; HOWARD MESSER and JAMES THOMAS, JR.,

APPEAL OF STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; and HOWARD MESSER

No. 5, W.D. Appeal Docket 1989

Appeal from the Order of the Superior Court at No. 218 Pittsburgh, 1987, entered May 13, 1988, reversing the Order of the Court of Common Pleas, Civil Division, Allegheny County, entered January 13, 1987 at No. GD 84-6520 and remanding the case.

374 Pa. Super 613, 543 A.2d 1138 (1988)

ARGUED: March 5, 1990

DISSENTING OPINION

JUSTICE ROLF LARSEN FILED: MARCH 15, 1991

The majority has just declared a "LAWYER'S HOLIDAY.". . . It's Christmastime for Pennsylvania lawyers. If a doctor is negligent in saving a human life, the doctor pays. If a priest is negligent in saving the spirit of a human, the priest pays. But if a lawyer is negligent in advising his client as to a settlement, the client

pays. . . .Thus, "filthy lucre" has higher priority than human life and/or spirit. The majority calls this "Public Policy." Maybe ... Maybe Not?? It sure expedites injustice. Should we change the law so that non-lawyers can be judges?

I dissent.

Mr. Justice Zappala joins in this dissenting opinion.

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service by first-class mail, postage prepaid, addressed as follows:

John R. Schadel, Esquire
David L. Haber, Esquire
Murphy, Taylor, Trout,
& Chestek, P.C.
326 Third Avenue
Suite 100
Pittsburgh, PA 15222

S. James Goldman, Esquire
330 Grant Building
Pittsburgh, PA 15219
(Attorney for defendant,
James Thomas, Jr.,
Esquire)

(Attorneys for Appellants Strassburger, McKenna, Messer, Shilobod and Gutnick, and Howard Messer)

April 1, 1991
Date

/s/ Kenneth W. Behrend
Kenneth W. Behrend
Attorney for Appellees

Behrend & Ernsberger
2400 Grant Building
Pittsburgh, PA 15219
(412) 319-2515

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 5 W.D. Appeal Docket 1989

PAMELA MUHAMMAD, Administratrix fo the
Estate of NAZIR MUHAMMAD and
ABDULLAH MUHAMMAD

vs.

STRASSBURGER, McKENNA, MESSER, SHILOBOD
and GUTNICK, a law partnership;
HOWARD MESSER and JAMES TOMAS, JR.

Appeal of
STRASSBURGER, McKENNA, MESSER, SILOBOD
and GUTNICK, a law partnership;
and HOWARD MESSER

PETITION FOR CLARIFICATION OF OPINION FILED BY THIS HONORABLE COURT ON MARCH 15, 1991

Appeal of the Order, Entered May 13, 1988
by the Superior Court of Pennsylvania,
(Reargument Denied July 8, 1988) at No. 218 Pgh. 1987,
reversing the Order, entered January 13, 1987, by the Court
of Common Pleas of Allegheny County, Pennsylvania
Civil Division at No. G.D. 84-6520

Kenneth W. Behrend
PA I.D. No. 00406

BEHREND AND ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

ATTORNEY FOR APPELLEES PAMELA
MUHAMMAD, ADMINISTRATRIX OF
THE ESTATE OF NAZIR MUHAMMAD
AND ABDULLAH MUHAMMAD

Appellees seek clarification as to whether or not this Honorable Court's dismissal of their counts in fraud is with leave to amend. Since this Honorable Court's decision is the first dismissing those counts on demurrer grounds, appellees contend that they should be so permited.

This Honorable court has held in its opinion in this case that ". . . only cases of fraud should be actionable" in cases by a former client against an attorney who settled a case. (Slip opinion, 3/15/91, p.5.) The Opinion then finds appellee's allegations of fraud to be insufficiently specific. "Unless the plaintiff can more fully describe what facts support the defendant attorneys' 'evil motives,' we consider those allegations as nothing more than unfounded accusations which have no apparent basis in fact." (p.14). The closing order paragraph then dismisses the complaint on demurrer grounds.

It is not clear from the face of the opinion, however, whether or not appellee may, on remand, file an amended complaint, pursuant to Pa.R.Civ.P. 1028(e). In this regard, appellee is obliged to

mention that this Honorable Court's opinion "take[s] note of the fact that the complaint forming the basis of the case before us is the plaintiffs' third attempt to draft a complaint that survives preliminary objections. The complaint we are reviewing is the plaintiffs' second amended complaint." (n.12, p. 14). This note does not, however, explicitly address the question of whether further amendment is permitted.

Pertinent to this determination is part of the case's procedural history. The Preliminary Objections to appellee's initial and First Amended Complaints were never adjudicated: in response to each of them appellee filed amended complaints pursuant to Pa.R.Civ.P. 1028(c).[1] Furthermore, the only Court of Common Pleas Order sustaining Preliminary Objections was on collateral estoppel grounds, which allowed for no amendment. That ground for dismissal was held to be in error by this

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[1] Fraud was pled in the First and Second Amended Complaints, not in the Original Complaint.

Honorable Court; and this Honorable Court's holding that the fraud allegations were insufficient is the first time a Court has ruled on that issue in this case.

In light of the absence of any Court of Common Pleas Order finding the allegations of fraud insufficiently specific and, accordingly, the absence of any opportunity to amend in response to such an order, appellees respectfully request that this Honorable Court allow, on remand, appellees to so amend.[2] In any event, appellees respectfully

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[2] The amendment requested would, substantially, be as follows:

Failure to Disclose

1. At a deposition of the anesthesiologist, it was stated that the anesthesia used, succinylcholine, posed a danger of lung damage for infants but that, at the time in question, the package insert information made no mention of this.

2. Said information provided the basis for a cause of action against the manufacturer of the drug.

3. Said information also provided a complete defense for the defendants who were in the case.

4. The operation in question occurred in 1977 and the deposition in question occurred in 1984.

5. As a consequence of this seven-year delay in uncovering this information, it was likely that any such case against the drug manufacturer would be found to be barred by the statute of limitations.

6. Defendants fraudulently failed to reveal to Plaintiffs that their negligence, in not pursuing discovery in a timely manner, had resulted in the untimely revelation of these critical facts.

7. This was done with the intent of not informing Plaintiffs of a potential cause of action against them for malpractice.

8. As a consequence of this fraudulent failure to disclose in the face of their fiduciary duty to disclose, Plaintiffs suffered the following injuries:

a) They were not given the opportunity to file against the drug manufacturer and attempt to overcome the statute of limitations problem.

b) They were not given the information regarding their counsel's tardily negligent development of the facts of the case so that they could bring a malpractice suit against them.

9. It remained for succeeding, and present, counsel to read the deposition of the anesthesiologist and uncover the initial facts alleged herein.

This, surely, does plead fraud with specific particularly. Remand with leave to amend here is not an empty exercise.

request that this Honorable Court clarify its Order with regard to whether or not such amendment is permitted.

Respectfully submitted,

/s/ ***Kenneth W. Behrend***

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service by first-class mail, postage prepaid, addressed as follows:

John R. Schadel, Esquire
David L. Haber, Esquire
Murphy, Taylor, Trout,
& Chestek, P.C.
326 Third Avenue
Suite 100
Pittsburgh, PA 15222

S. James Goldman, Esquire
330 Grant Building
Pittsburgh, PA 15219
(Attorney for defendant,
James Thomas, Jr.,
Esquire)

(Attorneys for Appellants Strassburger, McKenna, Messer, Shilobod and Gutnick, and Howard Messer)

April 1, 1991
Date

/s/ Kenneth W. Behrend
Kenneth W. Behrend
Attorney for Appellees

Behrend & Ernsberger
2400 Grant Building
Pittsburgh, PA 15219
(412) 319-2515

IN THE SUPREME COURT OF PENNSYLVANIA

No. 5 W.D. Appeal Docket 1989

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD

vs.

STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK, a law partnership; HOWARD MESSER and JAMES THOMAS, JR.

Appeal of
STRASSBURGER, MCKENNA, MESSER, SHILOBOD and GUTNICK a law partnership; and HOWARD MESSER

ANSWER TO APPELLEE'S PETITIONS FOR CLARIFICATION AND REARGUMENT

Appeal of the Order, Entered May 13, 1988 by the Superior Court of Pennsylvania, at No. 218, Pgh. 1987 (Reargument Denied July 8, 1988) reversing the Order, entered January 13, 1987, by the Court of Common Pleas of Allegheny County Civil Division at No. G.D. 84-6520

James R. Schadel, Esquire
Pa. I.D. #27937
David L. Haber, Esquire
Pa. I.D. #39574

MURPHY, TAYLOR & TROUT, P.C.
326 Third Avenue
Pittsburgh, PA 15222
(412) 255-0200

ATTORNEY FOR APPELLANTS STRASSBURGER, MCKENNA MESSER, SHILOBOD AND GUTNICK AND HOWARD MESSER

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

PAMELA MUHAMMAD, administratrix of the Estate of NAZIR MUHAMMAD, and ABDULLAH MUHAMMAD,

Plaintiffs,

vs.

STRASSBURGER, MCKENNA, MESSER, SHILOBOD AND GUTNIK, a law Partnership, HOWARD MESSER, and JAMES THOMAS, JR.,

Defendants.

JURY TRIAL DEMANDED

CIVIL DIVISION

No. GD 86-19191

Code 011

SECOND AMENDED COMPLAINT

Filed on behalf of: Pamela Muhammad, Administratrix of the Estate of Nazir Muhammad, and Abdullah Muhammad

Counsel of Record for Party:

Kenneth W. Behrend, Esquire
Pa. I.D. No. 00406

BEHREND, MORAN, ERNSBERGER & TAMILIA
Firm I.D. No. 018
1320 Grant Building
Pittsburgh, PA 15219

[THIRD EXHIBIT TO APPELLANTS' ANSWER TO APPELLEE'S PETITIONS FOR CLARIFICATION AND REARGUMENT]

NOTICE TO DEFEND

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and by filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a Judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Lawyer Referral Service
THE ALLEGHENY COUNTY BAR ASSOCIATION
920 City-County Building
Pittsburgh, Pennsylvania 15219

Telephone: (412) 261-0518

JURY TRIAL DEMANDED

SECOND AMENDED COMPLAINT

This action is brought on behalf of the Plaintiffs by and through their lawyer, Kenneth W. Behrend and the law firm of Behrend, Moran, Ernsberger & Tamilia. The case of Bowman v. Abramson, 545 F.Supp. 227 (E.D. Pa., 1982) says that an action against a lawyer for professional negligence is subject to the defense of prematurity. It is certain under the law and facts whether the complaint filed in the Common Pleas Court of Allegheny County, No. GD84-6520, is in part subject to the defense of prematurity, i.e., that a cause of action had not yet accrued, as raised by the defendants in their Preliminary Objections; consequently, it is interpreted by necessary implication that the trial court decided the cause of action described below as being premature.

1. Plaintiff, Pamela Muhammad is the mother of the deceased, baby boy, Nazir Muhammad. She is the Administratrix of his estate, No. 5024 of 1978. She and Abdullah Muhammad, now

divorced, were married at the time of the birth and death of Nazir Muhammad. Pamela Muhammad, at all times material, hereto, and at the present time, is a resident of Allegheny County, Pennsylvania.

2. Abdullah Muhammad is the father of the deceased baby boy, Nazir Muhammad. He is a resident of Denver, Colorado.

3. Strassburger, McKenna, Messer, Shilobod and Gutnik, is a partnership of lawyers organized to practice Law. Howard Messer is a partner and an individual defendant. They maintain an office in Pittsburgh, Pennsylvania.

4. At all times material, hereto, the firm of Strassburger, McKenna, Messer, Shilobod and Gutnik and Howard Messer held themselves out as lawyers and experienced practitioners specializing in Medical Malpractice cases; possessing superior knowledge and skill in such cases.

5. Defendant, James Thomas, Jr., is a lawyer with an office in Pittsburgh, Pennsylvania. At all

times material hereto he was engaged in the general practice of the law.

6. Nazir Muhammad, the deceased son of Pamela Muhammad and Abdullah Muhammad, was born November 7, 1977.

7. In November of 1977, an incomplete circumcision was performed at the Magee-Womens Hospital on Nazir Muhammad by an employee-surgeon of the hospital, who was authorized to perform the operation in the scope of his employment. The attempted circumcision was negligently performed, in that, it was not done according to the standard of a reasonable man using due care under the circumstances. The technique of operation deviated from the required standard of care, which was to remove the proper amount of foreskin in one operation. The operation resulted in the removal of an insufficient amount of foreskin and causing his penis to have a redundant prepuce with phimosis, a condition of his penis that threatened

the integrity of the penis and presented a hygiene and health hazard.

8. The pediatrician for Nazir Muhammad advised the plaintiffs to have the negligent foreskin operation corrected.

9. Therefore, the plaintiffs arranged to have the negligent foreskin operation corrected, and on December 16, 1977, at the Children's Hospital of Pittsburgh, Nazir Muhammad was operated upon again to complete the removal of the foreskin. As a consequence of succinylcholine given to him in preparation for general anesthesia he suffered fatal pulmonary edema. He lingered until December 19, 1977, and died from pulmonary insufficiency.

11. In the month of March, 1978, Plaintiffs retained and employed defendant, James Thomas, Jr., to represent them in a claim arising from the death of their infant son, Nazir Muhammad.

12. In the month of October, 1978, Plaintiffs, at the urging of Defendant, James Thomas, Jr., retained and employed the defendant law firm,

Strassburger, McKenna, Messer, Shilobod and Gutnik, and the defendant individual member of that firm, Howard Messer, to prosecute the claim arising from the death of their infant son, Nazir Muhammad.

13. The defendants had The Register of Wills of Allegheny County on October 26, 1978, at Number 5024 of 1978, grant Letters of Administration unto Abdullah Muhammad. Abdullah Muhammad, subsequently, on July 3, 1984, renounced his rights to administer the estate of his son, Nazir Muhammad, and resigned, giving the duties of Administratrix of the said estate to Pamela Muhammad, the mother of the decedent.

14. On November 18, 1978, Defendants filed Notice of Complaint with the Medical Arbitration Board on behalf of Plaintiffs against The Children's Hospital of Pittsburgh, Stuart E. Price, Jr., M.D., and Helen Westman, M.D.

15. On April 13, 1979, Defendants filed a Complaint in the Court of Common Pleas of

Allegheny County, Pennsylvania, on behalf of Plaintiffs against The Children's Hospital of Pittsburgh, Stuart E. Price, Jr., M.D., and Helen Westman, M.D.

16. Previously, in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. G.D. 84-6520, Plaintiffs brought an action against the same defendants named in this instant action. In that action they asserted two separate claims against the defendants, to comply with the doctrine of prohibition against splitting causes of action.

17. The one claims was based on the failure to file suit, asserting:

> a. that the defendants did not bring action against Magee-Womens Hospital, and an employee resident surgeon for a negligently performed circumcision;
> b. that the defendants did not file a products liability claim under the Restatement of Torts 2d, section 402A, for a defect in succinylcholine that caused the death of the infant son.

18. The other claim was based on the deception of the defendants in causing the plaintiffs to settle the negligence claim, for improper administration of anesthesia against The Children's Hospital of Pittsburgh, the anesthesiologist and the surgeon who were attempting to correct the negligently performed circumcision performed at Magee-Womens Hospital.

19. The insurance carriers for The Children's Hospital of Pittsburgh, the anesthesiologist, and the surgeon succeeded in enforcing settlement against the plaintiffs. The Superior Court of Pennsylvania by order of November 23, 1984 enforced the settlement of $26,500 for the death of the infant son.

20. The money acquired through this settlement was deposited with the Prothonotary of Allegheny County and has not been touched by Plaintiffs.

21. The issue of the defendant's herein obtaining the consent of the plaintiffs by deception was not before the trial court, if the defense of prematurity is part of the law of Pennsylvania.

22. Defendants pleaded prematurity in their Third Preliminary Objections, stating:

> "4. The Plaintiffs have failed to state the requisite actual loss to recover in a legal malpractice action inasmuch as Plaintiffs have only plead speculative harm and have not plead actual harm presently realized."

23. The issues of not filing against proper parties for the improperly performed circumcision and for a products injury were before the court, and are not subject to the defense of prematurity.

24. The issue of the negligence of the defendants that under the doctrine of Bowman v. Abramson, 545 F. Supp. 227 (E.D., Pa., 1982) that were subject to the objection of prematurity are the facts upon which the causes of action for deception are based. Had the Superior Court of Pennsylvania ordered the trial in the previous case, Muhammad, et al., v. Children's Hospital of Pittsburgh, Stuart E. Price, Jr., M.D., and Helen Westman, M.D., at

No. GD81-02864, to proceed, it would have proceeded on the basis of negligent anesthesia administration.

25. Until the decision of the Superior Court, the causes of action presented in this instant action were subject to the defense of prematurity.

COUNT I
FRAUDULENT MISREPRESENTATION
(DECEIT)

26. Paragraphs 1 through 25 are incorporated by reference, thereto, as though they were set forth, herein, at length.

27. The defendants have acted with evil motive, with intent to deceive and mislead Plaintiffs, to Plaintiffs' harm.

28. Defendants made fraudulent misrepresentations at the outset, throughout and at the termination of the attorney-client relationship by making false and misleading misrepresentations of fact,

opinion and intention. The details of which are described immediately below.

29. The Defendants misrepresented their performance as the Plaintiffs' lawyers as though they did all things required of them by the relationship of attorney and client, when in fact, they had been careless in their work in that: they failed to make any investigation of medications administered to Nazir Muhammad at The Children's Hospital of Pittsburgh associated with the anesthesia procedure - specifically succinylcholine, which caused the death of the infant son; they failed to take timely depositions, which were taken after the applicable Statute of Limitations had run, revealed the harm and death caused by the administration of succinylcholine; they failed to attempt to discover what was discoverable about succinylcholine - that it was sold containing a defect that could case death in an infant and that that defect was not warned of in the package insert nor who was the manufacturer and who were the sellers, within the time permitted of

the applicable Statute of Limitations; they failed to bring suit or give advice pertinent to bringing suit against Magee-Womens Hospital and its employee-surgeon for the negligence in performing the original incomplete circumcision, within the time permitted by the applicable Statute of Limitations; they failed to bring suit or give advice pertinent to the bringing of suit against the sellers of the succinylcholine, including The Children's Hospital of Pittsburgh and the manufacturer-seller, within the time permitted by the applicable Statute of Limitations; and, the defendants urged a settlement on the plaintiffs with evil motive, falsely telling them that a jury would not award more than $26,500 offered because they were poor and black, when, in fact and in opinion, they had no rational basis for saying this. The purpose in making the utterance was to have the plaintiffs accept the settlement; planning, thereby, that their negligence and the harm done therefrom would go unnoticed

and that they could secure a settlement that would foreclose the plaintiffs from redress them.

30. Defendants made additional misrepresentations of fact which were altogether untrue, false, misleading and fraudulent. They asserted that they were pursuing a claim based on lack of informed consent because of failure to advise, "the parents of the decedent of the dangers and/or risks involved in a repeat circumcision or in the propriety of administering general anesthesia, to perform a circumcision, and failed to obtain the informed consent of the decedent's parents or guardians, to such a procedure". In fact, the defendants did not procure expert testimony to establish this proposition, nor file such expert report to permit such evidence to be introduced at trial. The defendants also asserted contrary to fact that they had brought action on behalf of the Plaintiffs on all applicable theories of action, against all possible parties.

31. Defendants made the following misrepresentations of opinion which were altogether, untrue, false, misleading and fraudulent:

a. that the Plaintiffs should accept a settlement of $26,500 because in the opinion of the defendants a jury would award no greater amount because they were poor and black.

b. that the defendants had brought suit under all theories of liability against all parties who were potentially responsible for the death of Nazir Muhammad.

32. The defendants had no basis for offering an opinion that they had sued all the potentially responsible parties under all applicable theories of liability, but continued to offer such opinion when it was clear that they had not. They then ventured the opinion about the Plaintiffs being poor and black limiting the possible recovery to $26,500. They offered this opinion, not because they believed it or had any basis in fact upon which to base such belief, but because they sought to mislead

the Plaintiffs to enter into a settlement to their harm.

33. The defendants made the misrepresentations of intention that they intended to prosecute fully any and all claims arising out of the death of Nazir Muhammad through a jury trial, if necessary. This was altogether untrue, false, misleading and fraudulent; the intention of the defendants was to only pursue the claims of the Plaintiffs to the extent that they could settle such claims without a jury trial.

34. The defendants entered into the representation agreement having no intention to try the case before a jury, but to settle for what settlement might be obtained with the least effort and most profit for them. Subsequently, they reinforced their intent not to prepare the case for trial and to cause the Plaintiffs to settle for $26,500; the defendants had the intent to cause the Plaintiffs to settle for $26,500 to avoid their negligence from being discovered and to prevent the Plaintiffs from maintaining a law suit against them; the defendants

did not have the intent to properly prepare the investigation of the cause of death and to obtain complete expert advice, but intended to handle the case in a time-cost effective manner, providing for the most possible money being earned by them in relation to the work performed; with inadequate preparation and the saving on expenditures for expert opinion and investigation to maximize the monetary return to them, without regard to obtaining adequate damages.

35. The Plaintiffs were deceived by the defendants and entered into a representation agreement with the defendants under the belief that the defendants would fairly represent them and that the defendants intended to prepare for a jury trial and be ready to try the case; and that the defendants intended to settle the case without trial was not communicated to them at the outset.

36. The Plaintiffs justifiably relied on the defendants, who were their lawyers, to their harm.

37. The Plaintiffs in their representative capacity have suffered damage as a direct and proximate result of the fraudulent concealment and misrepresentations of the defendants. But for the acts of the defendants, damages would have been recovered by Plaintiffs as parents for the loss of decedent's society, companionship, services, aid and comfort, assistance, wages and their pecuniary losses, either by jury trial or settlement, substantially in excess of $26,500; they would have prevailed in a jury trial that included the omitted defendants, identified herein, with the inclusion of all the theories of recovery; they would have recovered substantially in excess of $26,500 by verdict or by settlement in their representative capacity and substantially in excess of $26,500 by verdict or by settlement as parents.

38. The Plaintiffs have been put to grievous trouble, vexation and annoyance which have been caused by Defendants' deceit.

39. The Plaintiffs are entitled to compensatory damages, including attorneys fees and pre-judgment interest.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory damages in an amount in excess of $20,000, together with delay damages.

COUNT II
FRAUDULENT CONCEALMENT
(DECEIT)

40. Paragraphs 1 through 25 are incorporated by reference, hereto, as though they were set forth, herein, at length.

41. Defendants, concealed from the Plaintiffs material information essential to making an informed decision as to whether the Plaintiffs should give consent to the proffered settlement of $26,500. They concealed this material information from the Plaintiffs by not informing them as was required of them as the Plaintiffs' attorneys and

with the certain knowledge that Plaintiffs could not be expected to learn of the concealment.

42. Acting with evil motive, with intent to deceive and mislead, the defendants concealed the material information as set forth in Paragraphs 29, 30, 31, 32, 33, 34.

43. The defendants did not inform the Plaintiffs of the consequences of the ostensible settlement assent by the Plaintiffs until after assent was given. They did not inform the Plaintiffs that the communication of an agreement of settlement to the Court by the defendants, as lawyers for the Plaintiffs, could bind the Plaintiffs to that settlement, with respect to proceeding on the claim filed stemming from the death of Nazir Muhammad.

44. Incorporated, herein, by reference thereto as though set forth in their entirety are paragraphs 35, 36, 37, 38 and 39.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defen-

dants for compensatory damages in an amount in excess of $20,000, together with delay damages.

COUNT III
NONDISCLOSURE

45. Paragraphs 1 through 43 are incorporated, herein, by reference thereto as though they were fully set forth in their entirety.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for pecuniary loss in an amount in excess of $20,000 together with delay damages.

COUNT IV
OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS

46. Paragraphs 1 through 45 are incorporated, herein, by reference, thereto, as though they were set forth at length.

47. The defendants by extreme and outrageous conduct, with evil motive, intentionally and/or

recklessly caused the Plaintiffs to suffer severe emotional distress by:

a. counseling the Plaintiffs falsely with evil motive that the sum of $26,500 is all the money that a jury would award for the death of their son Nazir, because they are poor and black and that they should; therefore, settle for this amount;

b. urging the Plaintiffs to settle so as to cover-up their malpractice;

c. not informing the Plaintiffs that the assent they gave their lawyers to settle when communicated to the Court would forever bind them;

d. not disclosing to the Court during the hearing to enforce the settlement that the Plaintiffs' assent to settle was urged upon the Plaintiffs by Howard Messer and the law firm of Strassburger, McKenna, Messer, Shilobod and Gutnik;

e. the giving of altogether false opinions as to the merit and value of the case;

f. not disclosing to the Plaintiffs or the Court before or during the hearing to enforce the

settlement, that the defendants Howard Messer and the law firm of Strassburger, McKenna, Messer, Shilobod and Gutnik, had failed to file suit against Magee-Womens Hospital and its employee-surgeon for the negligently performed circumcision and that this would substantially increase the value of Plaintiffs case;

g. not disclosing to the Plaintiffs or to the Court that the defendants Howard Messer and the law firm of Strasssburger, McKenna, Messer, Shilobod and Gutnik, had failed to timely investigate the cause of Nazir Muhammad's death and had they done so by taking a timely deposition of Helen Westman they would have discovered that the succinylcholine was responsible for the death of their son and that this would have led to a products liability action against Children's Hospital and the manufacturer-seller of succinylcholine and that this would substantially increase the value of Plaintiffs' case;

h. and in failing to inform the Court during the hearing to enforce the settlement that the defendants, Howard Messer and the law firm of Strassburger, McKenna, Messer, Shilobod and Gutnik, were in violation of Allegheny County Rules of Civil Procedure, Rule 212, which required an expert opinion to be obtained and filed with regard to that portion of the complaint which states that the informed consent of the Muhammads was never obtained by the Children's Hospital, Dr. Price or Dr. Westman for the use of general anesthesia for this minor surgical procedure.

48. The Plaintiffs suffered emotional shock as a result of the defendants intentional outrageous conduct as described.

49. The conduct of the defendants was so extreme and outrageous that they are liable to the Plaintiffs for the emotional distress because of their conduct alone, whether or not the Plaintiffs suffered actual emotional shock.

50. The Plaintiffs are entitled to compensatory damages.

51. Exemplary damages must be awarded against the defendants to discourage their willful and wanton misconduct in violation of their fiduciary obligation.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory damages, in an amount in excess of $20,000, together with delay damages.

COUNT V

BREACH OF FIDUCIARY OBLIGATION

52. Paragraphs 1 through 25 and 46 through 51 are incorporated by reference, thereto, as though they were set forth, herein, at length.

53. The defendants, in an attorney and client relationship with the Plaintiffs were under a fiduciary obligation of the highest order. They violated this trust when they undertook representation of the Plaintiffs with the undisclosed intent of not to pros-

ecute their claim to jury verdict, when they did not disclose their inept and negligent representation to the Plaintiffs, when they gave from evil motive the opinion that the Plaintiffs were limited in their claim to $26,500 because they were poor and black, and when at the hearing to enforce the settlement they did not disclose to the court how they obtained an utterance of consent from the wife-Plaintiff.

54. The Plaintiffs are entitled to compensatory damages equal to the amount they would have recovered, either by jury trial or settlement, and counsel fees and pre-judgment interest.

55. Exemplary damages must be awarded against the defendants to discourage their willful and wanton misconduct in violation of their fiduciary obligation.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory and punitive damages in an amount in excess of $20,000 plus delay damages.

COUNT VI

NEGLIGENCE - BUT FOR STANDARD

56. Paragraphs 1 through 25 are incorporated herein by reference, thereto, as though they were set forth at length.

57. The Plaintiffs assert that had the defendants properly pursued by adequate discovery, investigation and trial preparation, by verdict or settlement in their favor in excess of $26,500 would have been recovered.

58. Further, the defendants did not pursue the cause of action filed based on lack of informed consent. The defendants asserted it in paragraph 17 of the complaint they prepared and filed by saying:

> "At the time of the admission none of the defendants advised the parents of the decedent, of the dangers and/or risks involved in a repeat circumcision or in the administration of general anesthesia, or in the propriety of administering general anesthesia, to perform a circumcision, and failed to obtain the informed consent of the decedent's parents or guardians, to such a procedure."

They were negligent because they did not file an expert report in compliance with Allegheny County Rules of Civil Procedure, Rule 212, permitting testimony explaining the risks between local and general anesthesia and the applicability of each.

59. The defendants were negligent in that they did not exercise the requisite skill and knowledge necessary to represent the Plaintiffs in their claim for the death of the infant, Nazir Muhammad. They did not act as reasonable men under the circumstances.

60. The defendants committed further acts of negligence in that:

a. they failed to make any investigation of medications administered to Nazir Muhammad at The Children's Hospital of Pittsburgh associated with the anesthesia procedure; specifically, succinylcholine;

b. they failed to take timely depositions, which, when taken, revealed the harm and death caused by the administration of succinylcholine;

c. they failed to attempt to discover what was discoverable about succinylcholine: that it was sold containing a defect that could cause death in an infant and that defect was not warned of in the package insert nor who was the manufacturer and who were the sellers, within the time permitted by the applicable Statute of Limitations;

61. Despite the holding forth of such skill the defendants did not possess or exercise the knowledge and skill of a specialist in medical malpractice cases.

62. The defendants did not possess the ordinary skill and knowledge required of them to represent the Plaintiffs in a medical malpractice action.

63. The defendants did not possess the required skill and knowledge to comprehend the patient (hospital) charts, of Nazir Muhammad; to uncover and understand adverse reactions of medications and anesthesia in children; to select the correct skilled help in analyzing the medical facts; to obtain and comprehend the manufacturer's package insert

of succinylcholine; to inquire and understand the significance of the failed circumcision.

64. The negligence of the defendants was the legal cause of the Plaintiffs suffering pecuniary loss. Their negligence so impaired the suit, that defendants pursued their course of settlement.

WHEREFORE, Plaintiffs demand joint, several and joint and several judgment against the defendants for compensatory damages in an amount in excess of $20,000, together with delay damages.

BEHREND, MORAN, ERNSBERGER & TAMILIA, Attorneys for Plaintiffs,

By: /s/ Kenneth W. Behrend

JURY TRIAL DEMANDED

AFFIDAVIT

Plaintiff in this action being inflicted with influenza with resulting elevated temperature, chest and nasal congestion, sore throat, and accompanying weakness, was unable to leave home to come to our office to sign the verification to this complaint. Therefore, I, Kenneth W. Behrend, hereby certify that the statements in the foregoing Complaint are true and correct to the best of my information, knowledge and belief.

Date_____ /s/ ***KENNETH W. BEHREND***

Sworn and subscribed

before me this 23rd day

of February, 1987.

/s/ Notary_____

IN THE SUPREME COURT OF PENNSYLVANIA

No. 5 W.D. Appeal Docket 1989

PAMELA MUHAMMAD, Administratrix of the
Estate of NAZIR MUHAMMAD and
ABDULLAH MUHAMMAD

vs.

STRASSBURGER, MCKENNA, MESSER, SHILOBOD
and GUTNICK, a law partnership;
HOWARD MESSER and JAMES THOMAS, JR.

Appeal of
STRASSBURGER, MCKENNA, MESSER, SHILOBOD
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AMENDMENT TO PETITIONS FOR CLARIFICATION AND REARGUMENT

Appeal from the Order, Entered May 13, 1988
by the Superior Court of Pennsylvania, at No. 218,
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reversing the Order, entered January 13, 1987,
by the Court of Common Pleas of Allegheny County
Civil Division at No. G.D. 84-6520

Kenneth W. Behrend
PA I.D. # 00406

BEHREND AND ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219

(412) 391-2515

ATTORNEY FOR APPELLEES PAMELA
MUHAMMAD, Administratrix of the
Estate of NAZIR MUHAMMAD
And ABDULLAH MUHAMMAD

The defendants have introduced to your honorable court case number GD 86-19191 of The Court of Common Pleas of Allegheny County, Pennsylvania (Introduced Case) in their Answer to Appellee's Petitions for Clarification and Reargument. The relationship between the Introduced Case and case number GD84-6520 (Present Case) has been declared "effectively the same case" -- the language of the Superior Court of Pennsylvania on May 13, 1988 dismissing the complaint in the Introduced Case.

A claim made in the court against a lawyer is uniquely different than in all other litigation. One of the unusual defenses that can be asserted is the defense of prematurity. In the Present Case the defense of prematurity was raised in the preliminary objections filed. When the writ was filed in the Present Case the plaintiffs were trying to save the defendants the embarrassment of a malpractice complaint by trying very hard to have the "settlement" set aside. The Present Complaint could reasonably be found to be premature. Thus,

when the defense of prematurity was raised the plaintiffs filed and served a second action, in 1986, two years after the 1984 writ and after the action to set aside the settlement was terminated by the Superior Court of Pennsylvania. The Introduced Case could not possibly be subject to the defense of prematurity. The first paragraph of the Introduced Case is explanatory:

> This action is brought on behalf of the plaintiffs by and through their lawyer, Kenneth W. Behrend and the law firm of Behrend, Moran, Ernsberger & Tamilia. The case of Bowman v. Abramson, 545 F.Supp. 227 (E.D. Pa., 1982) says that an action against a lawyer for professional negligence is subject to the defense of prematurity. It is uncertain under law and facts whether the complaint filed in the Common Pleas Court of Allegheny County, No. GD84-6520, is in part subject to the defense of prematurity, i.e., that a cause of action had not yet accrued, as raised by the defendants in their Preliminary Objections; consequently, it is interpreted by necessary implication that the trial court decided the cause of action described below as being premature. Page 138a of

Answer to Appellee's Petitions for Clarification and Reargument

Plaintiffs are confident that a reading of the complaint of the Introduced Case will convince Your Honorable Court that fraud has been pleaded with sufficient particularity to satisfy the most rigorous standard of fraud in the inducement:

> 29. . .the defendants urged a settlement on the plaintiffs with evil motive, falsely telling them that a jury would not award more than the $26,500 offered because they were poor and black, when, in fact and in opinion, they had no rational basis for saying this. Their purpose in making the utterance was to have the Plaintiffs accept the settlement; planning, thereby, that their negligence and the harm done therefrom would go unnoticed or that they could secure a settlement that would foreclose the Plaintiffs from redress against them." (Emphasis added) Page 144a, Answer to Appellee's Petitions for Clarification and Reargument

Plaintiffs are on the verge of being denied the right to proceed with their case because of fraud pleading found to be not specific enough. It has occurred to the plaintiffs with the injection of the

Introduced Case that Your Honorable Court may not be aware of the very specific pleading with respect to fraud pleaded in this "effectively the same case". After all, the Complaint in the companion case was lodged in the Prothonotary's office in Allegheny County.

With all due respect it is urged that Your Honorable Court determine that after considering the complaint in the Introduced Case that no one can say that the specifics of fraud were not pleaded in the companion case (Introduced Case). And that the defendants were aware of the very specific pleading of fraud.

It is urged that Your Honorable Court recognize the realities of what was presented to and served upon the defendants. Because of the specificity with which fraud was pleaded in the Introduced Case, on the fraud issue, it is respectfully advanced that the cause, therein, as found by the Superior Court is effectively identical to the Present Case. The pleadings, therein, are no surprise to the defendants and should be met at trial and should be

considered as effectively incorporated in the Present Case.

It is asked that a re-briefing be ordered in the Present Case or the Present Case be permitted to be amended with respect to fraud pleading or the Present Case be permitted to proceed to trial on the issue of fraud.

Respectfully Submitted,

/s/ Kenneth W. Behrend